IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Original, No.

IN THE MATTER OF WALTER J. GREGORY.

APPLICATION FOR LEAVE TO FILE A PETITION FOR THE WRIT OF HABEAS CORPUS.

Comes here now Walter J. Gregory, a citizen of the United States and a resident of the State of Maryland, who, through his attorneys, A. S. Worthington and Frank J. Hogan, respectfully applies to this honorable court for leave to file his petition for the writ of *habeas corpus*, a copy of said proposed petition being annexed hereto.

The applicant respectfully represents to the court that he is now unlawfully restrained of his liberty by the warden of the jail of the District of Columbia, upon the authority of a void sentence pronounced against this applicant as a result of a prosecution based on sections 1176 and 1177 of the Revised Statutes for the District of Columbia, the same being an unconstitutional act of Congress, approved Feb-

ruary 17, 1873. Said sections are fully set forth in the proposed petition.

And this applicant respectfully moves the court that pending the consideration of this application and of his petition and the hearing thereon this court will, by such order in the premises as may be deemed proper, admit the applicant to bail.

Respectfully submitted,

A. S. Worthington,
Frank J. Hogan,
Attorneys for Walter J. Gregory.

PROPOSED PETITION.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Original No.

Ex Parte WALTER J. GREGORY, *Petitioner.*

To the Honorable the Supreme Court of the United States:

The petitioner, Walter J. Gregory, respectfully represents as follows:

1. He is a citizen of the United States and a resident of the State of Maryland, and is now unlawfully restrained of his liberty by the warden of the jail of the District of Columbia, to wit, Thomas H. McKee.

2. The facts concerning the said unlawful detention of the petitioner and the claim of authority under and by virtue of which he is detained are as follows:

(*a*) Heretofore, to wit, on the twenty-eighth day of December, 1909, in the Police Court of the District of Columbia, there was filed by the corporation counsel, for and on behalf of the said District of Columbia, an information ostensibly based upon sections 1176 and 1177 of the Revised Statutes relating to the District of Columbia, which are as follows:

> "SEC. 1176. So much of the act of the Legislative Assembly of the District of Columbia, entitled, 'An act imposing a license on trades, business and professions practiced or carried on in the District of Columbia,' approved August twenty-third, eighteen hundred and seventy-one, as authorizes gift enter-

> prises therein, and licenses to be issued therefor, is disapproved and repealed, and hereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise.
>
> "SEC. 1177. Every person who shall in any manner engage in any gift enterprise business in the District shall, on conviction thereof in the Police Court, on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the Court."

The above quoted sections of the Revised Statutes of the District of Columbia constitute the Act of Congress of February 17, 1873. It will be noted that said act denounces as unlawful the engaging by any person "in said business in any manner as defined" in the act of the Legislative Assembly, approved August 23, 1871 (Acts Legislative Assembly of Dist. of Col., part 2, pp. 87, 96), which last-mentioned act authorized and licensed gift enterprises. It thus becomes necessary to refer to the said act of the Legislative Assembly to ascertain the character of the "said business," which the act of Congress of February 17, 1873, constituting sections 1176-77, Revised Statutes District of Columbia, makes an offense. The material portion of said act of the Legislative Assembly is as follows:

> "Every person who shall sell or offer for sale any article * * * of merchandise of any description whatever * * * with a promise, express or implied, to give or bestow * * * any article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character * * * shall be regarded as a gift enterprise."

Pursuant to a stipulation between the corporation counsel of the District of Columbia and the attorney for

your petitioner, an agreed statement of facts, showing the nature of the business conducted in said District by your petitioner, which it was claimed by the District was violative of law, was filed in said Police Court and considered as a part of the information in said case. A copy of the certified record, containing said information and said agreed statement of facts, is appended hereto, made part hereof, and marked "Exhibit A."

(*b*) Thereafter, and on, to wit, the twenty-eighth day of December, A. D. 1909, your petitioner filed in said Police Court a motion to quash said information so filed against him.

(*c*) Thereafter, after hearing argument of counsel on said motion to quash said information, the court on, to wit, the twenty-seventh day of January, A. D. 1910, sustained said motion to quash the information and discharged the defendant and filed an opinion setting forth its reasons therefor. Certified copy of said motion to quash the information and of said judgment of the Police Court, together with the opinion of the judge of the Police Court, sustaining said motion to quash, is hereunto annexed, marked "Exhibit B," and made a part of this petition.

(*d*) Thereafter, on, to wit, January 31, 1910, upon the application of the said District of Columbia, the Court of Appeals of the District of Columbia issued to the said Police Court a writ of error, removing said cause to said Court of Appeals for review therein. Copy of the certified record, showing the exceptions on the part of the District of Columbia to the ruling of the judge of the Police Court, the presentation and execution of the bill of exceptions, and the writ of error to the Police Court allowed by the Chief Justice of the Court of Appeals, is hereunto annexed, marked "Exhibit C," and made part hereof.

(*e*) In the Court of Appeals of the District of Columbia, as had been the case in the Police Court of the District of Columbia, the case of your petitioner was argued

together with the case of one William B. Kraft, who had, on the same day, in the same court, been charged with a violation of the same act of Congress. In the Police Court the honorable judge thereof filed his opinion in the case of your petitioner; in the Court of Appeals the opinion of the court and the dissenting opinion of Mr. Justice Van Orsdel, covering both the cases of said Kraft and of your petitioner, were filed in the case of said Kraft, and were made and considered as the court's opinion in the case of your petitioner as well as of said Kraft. A certified copy of the proceedings in the Court of Appeals, including the majority and minority opinions rendered by the justices of said court, is hereunto annexed, marked "Exhibit D," and made part hereof.

(f) Thereafter, to wit, on the thirty-first day of May, 1910, your petitioner filed in the Supreme Court of the United States his petition for the writ of certiorari to the Court of Appeals of the District of Columbia, and filed in this court, as required under its rules, in connection with said petition for the writ of certiorari, a full record of the proceedings in the Police Court and in the Court of Appeals of the District; said petition for the writ of certiorari was entitled in this court, "Walter J. Gregory, Petitioner, *vs.* The District of Columbia, No. 583, October Term, 1910." Your petitioner on, to wit, the seventeenth day of October, 1910, duly submitted his petition for the writ of certiorari to this honorable court, and his attorney filed a brief in support thereof, referring at the same time to, and adopting, a brief which was then and there filed in support of the similar petition of said William B. Kraft, No. 588, October Term, 1910.

(g) Thereafter, to wit, on the twenty-fourth day of October, 1910, this honorable court made an order denying the prayer of your petitioner's petition for the writ of certiorari.

(h) Thereafter, to wit, on the first day of November, 1910, the Court of Appeals of the District of Columbia di-

rected its mandate, reversing the judgment of the Police Court in petitioner's case, to issue to said Police Court, and said cause was on said date remanded by said Court of Appeals to the Police Court of the District of Columbia, to be there proceeded with in accordance with the opinion of the said Court of Appeals. Copy of said mandate is hereto annexed, marked "Exhibit E."

(*i*) Afterwards, to wit, on the 3d day of November, 1910, your petitioner appeared in the Police Court of the District of Columbia, and, being arraigned on said information, pleaded not guilty to the charge therein made against him, and thereupon, a jury trial being waived in open court, the case was submitted to the judge of said Police Court upon the agreed statement of facts hereinbefore mentioned and forming part of "Exhibit A" hereof; and thereupon, in said court, on the 7th day of November, 1910, the said judge found your petitioner guilty of the charge contained in said information and convicted him upon said information, and upon such conviction the petitioner was sentenced by said court to pay a fine of $100, or in default of the payment of said fine to be imprisoned in the common jail of the District of Columbia for the period of five months; and the petitioner was thereupon, on, to wit, the 7th day of November, A. D. 1910, committed to the custody of the said warden of the jail of the District of Columbia, under the said judgment and sentence, and the said warden took the petitioner into his custody and now confines him in such custody and deprives him of his liberty by virtue thereof.

3. The said Police Court was without jurisdiction in the premises and said judgment and sentence were and are wholly void because the act upon which said information was based is contrary to the Constitution of the United States in this, among other things, that it is not within the power of the Congress of the United States under the Constitution of the United States to deprive a citizen of his liberty with-

out due process of law, by denouncing and punishing as an offense the engaging in a business which in no way interferes with the public health, safety, peace, or morals, and which is esentially legitimate; and because said statute is an unreasonable and unjustifiable interference with the freedom of trade and contract, and an unreasonable and invalid attempt at the exercise of the police power of Congress over this District; wherefore said judgment under said statute is void in that it undertakes to deprive this petitioner of his liberty, and of his right to conduct business, without due process of law.

4. Copies of the judgment of the Police Court, convicting and sentencing the petitioner, and of the order of commitment, whereunder he was taken into custody by the said warden are annexed hereto, marked Exhibits "F" and "G," and made part hereof.

5. The business in which your petitioner was engaged, the conducting of which constitutes the alleged offense for which he has been convicted and sentenced, was the carrying on of what is known as "the trading stamp business." Your petitio er entered into contracts with a large number of retail merchants in the District of Columbia, whereby the petitioner undertook to advertise the business of said merchants by various methods of advertisement, such as printing and distributing many thousands of directories and circulars, supplying the merchants with special advertising signs, making house to house canvasses, by newspaper and other publications, for the purpose of increasing the cash custom of said contracting merchants; under said contracts, the merchants agreed to purchase, and the petitioner to supply, at the rate of $3.50 per thousand, trading stamps or coupons issued by the petitioner, as local manager for the Sperry and Hutchinson Company; the merchants agreed to give to each cash paying customer one of

said stamps for each ten cents represented in the purchase, as evidence of said purchase and payment therefor; and the petitioner agreed to redeem such stamps, when presented by the customers, in cash, at the rate of one per cent of the amount of the purchases made by the customers from the merchants, as represented by the number of stamps so presented by the customers; or, at the option of the customers, to redeem said stamps in articles of merchandise, instead of in cash, which said articles of merchandise are kept constantly on display at the petitioner's place of business in the city of Washington, each of said articles being plainly marked, showing the number of trading stamps for which the articles would be exchanged. Said trading stamps were redeemable in any number, from one upwards, and without any limit as to the period within which they should be presented.

6. Your petitioner respectfully represents that the question involved in this case is the constitutionality of a statute which, in terms, makes it unlawful for a merchant to accompany the sale of a lawful article by the gift of another lawful article as an inducement to the sale.

The petitioner is advised and avers that Sections 1176 and 1177 of the Revised Statutes for the District of Columbia, including, as they do, the definition of a gift enterprise as given in the act of the Legislative Assembly above quoted, are unconstitutional, because they are an unwarranted interference with the freedom of trade and contract; that because they are void said Police Court was and is without jurisdiction in the premises; and that said prosecution and sentence thereunder are void, because they are based on a statute which is in violation of the Fifth Amendment to the Constitution of the United States.

Wherefore, the petitioner prays that the writ of *habeas corpus* may issue from this court, directed to the said Thomas H. McKee, warden aforesaid, commanding him to

produce the petitioner before this court, together with the cause of his detention, and also, if need be, that a writ of certiorari be directed to the clerk of the said Police Court of the District of Columbia, requiring him to bring into this court a full, complete, and duly certified copy of the records, and each of them, of the entire proceedings against the petitioner in the premises, and that, pending this petition and upon the hearing thereof, this court will, by such order in the premises as may be deemed proper, admit the petitioner to bail.

WALTER J. GREGORY,
Petitioner.

A. S. WORTHINGTON,
FRANK J. HOGAN,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Before me, a notary public in and for the District aforesaid, personally appeared Walter J. Gregory who, being by me first duly sworn, deposes and says that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts in the said petition stated and set forth are true.

WALTER J. GREGORY.

Subscribed and sworn to before me this 7th day of November, A. D. 1910.

[NOTARIAL SEAL.] BESSIE B. SHEEHY,
Notary Public, D. C.

EXHIBIT "A."

In the Police Court of the District of Columbia, December Term, 1909.

No. 348701.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

Information for Violation of Law Relating to Gift Enterprise.

Be it remembered, that in the Police Court of the District of Columbia, at the City of Washington, in the said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above entitled cause, to wit:

Bill of Exceptions.

Filed Jan. 28, 1910. F. A. Sebring, Clerk Police Court, D. C.

In the Police Court of the District of Columbia.

No. 348701.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

Be it remembered that at the trial of this cause, which came on for a hearing on the twenty-eighth day of December, A. D. 1909, before the Honorable Alexander R. Mullowny, one of the Judges of the Police Court of the District of Columbia, upon the following information, to wit:

In the Police Court of the District of Columbia, December Term, A. D. 1909.

THE DISTRICT OF COLUMBIA, *ss:*

James L. Pugh, Jr., Esq., Assistant Corporation Counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into Court, and causes the Court to be informed, and complains that Walter J. Gregory, late of the District aforesaid, on the First day of November in the year A. D. nineteen hundred and nine, and on divers other days and times between the said first day of November and the twentieth day of December in the year nineteen hundred and nine, in the City of Washington and in the District of Columbia aforesaid, did engage in the business of a gift enterprise; contrary to and in violation of Sec. 1177 of the Revised Statutes Relating to the District of Columbia, and constituting a law of the District of Columbia.

JAMES L. PUGH, JR.,
Assistant Corporation Counsel.

Personally appeared J. E. Armstrong, this 28th day of December, A. D. 1909, and made oath before me that the facts set forth in the foregoing information are true.

[SEAL.] J. B. PEYTON,
Deputy Clerk Police Court of the District of Columbia.

The following agreed statement of facts was filed, to wit:

In the Police Court of the District of Columbia.

No. 348701.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

Agreed Statement of Facts.

It is hereby agreed between the District of Columbia and the defendant Walter J. Gregory that the following may be considered by the court as having been offered in evidence,

duly proven, and shall have the same force and effect as if credible witnesses had duly testified thereto under oath. Either party reserving the right to object to the relevancy or materiality of any of said facts so agreed upon.

The defendant Walter J. Gregory is the managing officer of The Sperry & Hutchinson Company, a private corporation organized under the laws of the State of New Jersey, and having its principal office in Jersey City, in said State. Said Company has a paid up capital of one Million Dollars, and a surplus of over Two Hundred and Fifty Thousand Dollars.

The defendant Walter J. Gregory conducts the business of said corporation in the District of Columbia and is not engaged in any other business in said District of any other sort whatsoever, and said business is conducted by said defendant in accordance with the contract stamps, stamp-books, tokens, catalogues, matters therein contained, as hereinafter set out, and the other facts hereinafter set forth.

That on, to wit, the 14th day of Sept., 1909, the defendant entered into a contract with Harry E. Haigley trading as the Haigley Ptg. Co., a merchant in the City of Washington, District of Columbia, which is as follows:

Opening Advertising Contract.

Washington, D. C.

This Agreement, made the 14th day of Sept., 1909, by and between Haigley Ptg. Co., Merchant, engaged in the Printing and Stationery Supplies business at No. 1915 Pa. Ave. N. W., *Street*, Washington, D. C. (hereinafter called the Subscriber), and The Sperry and Hutchinson Company, a corporation of the State of New Jersey (hereinafter called the Company), Witnesseth:

Whereas, the Subscriber desires to advertise his business and increase his cash trade by giving to his cash-paying customers a rebate or discount upon small payments in cash; and desires to furnish such cash-paying customers with tokens of such payments, in the form of adhesive stamps, which in certain numbers shall entitle said customers to receive such rebate in cash or merchandise; and, whereas, said objects can be best accomplished by co-operation with other merchants, Subscribers to this agreement, and through the services of said Company;

Now, Therefore, it is understood and agreed by and between the parties hereto, in consideration of the mutual promises and agreements hereinafter contained, as follows:

Said Company agrees to print and distribute throughout the City of Washington at least fifty thousand directories containing the names, business and business addresses of the Subscribers to this agreement; and also to print and distribute an equal number of booklets to be known as "Trading Stamp Books," with pages ruled off for the convenient insertion therein of said rebate tokens or stamps when issued by said Subscriber; also to furnish said Subscriber with a sufficient number of said tokens or stamps to enable the Subscriber to issue one stamp for each ten cents paid by his cash customer, said stamps to be marked with a series letter and number devoted exclusively to said Subscriber; and also to furnish said Subscriber with metal and card advertising signs for display in and about his store, informing the public that said Subscriber gives said stamps to his customers.

Said Company agrees to redeem said stamps in cash (at the rate of ten cents per hundred), or in the general merchandise carried by the Company, at the option of the person presenting them for redemption, provided such person has received the same from the Company's Subscribers upon cash payments for goods purchased, and subject to the conditions herein and in said Trading Stamp Books.

Said Subscriber agrees to order and receive from said Company said stamps in lots of not less than one pad per lot, each pad containing one thousand stamps, and to pay upon delivery for the use thereof as an advertising medium, and for the services rendered by said Company, the sum of 3 50/100 dollars per pad; and agrees to offer to customers upon making purchases, and to give when accepted by them, as an inducement for cash trade, and for redemption only by said Company, one of said stamps for each and every ten cents (10c.) represented in the retail price of goods for which cash is paid by said customer, as a token of such payment and as a rebate or discount; and agrees not otherwise to use, procure or dispose of said stamps, without the written consent of said Company.

The Subscriber further agrees to display prominently in the windows and upon the exterior of his store the advertising signs furnished by said Company, and agrees to advertise *We give "S. & H." Green Trading Stamps* in all news-

paper and other advertisements published by or for him, and agrees not to use any other vouchers, premium tokens, stamps or similar devices during the term of this agreement.

It is Mutually Agreed between the parties hereto that the property in and title to said stamps and advertising signs shall remain in said Company, and shall not in any event pass to said Subscriber or any other person, firm or corporation, the purpose of said stamps being to identify to said Company the cash-paying customers of its Subscribers, who may be entitled to the discount redemption thereof as aforesaid.

This Agreement shall remain in force for one year from the date of its taking effect, and shall renew itself for an equal period from year to year, unless written notice to the contrary be given by either party to the other at least thirty days prior to the yearly periods of expiration; and in case such notice be given said Company may thereafter omit from its subsequently printed directory and advertisements the name of said Subscriber.

It is Mutually Understood and Agreed that this contract is made for the benefit of the Subscriber's customers as well as of the parties hereto.

This Agreement shall take effect upon the opening of the Company's store in Washington.

In witness whereof, the parties hereto have executed the foregoing agreement the day and year above written.

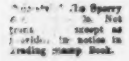
THE SPERRY AND HUTCHINSON COMPANY.
By WALTER J. GREGORY.
HARRY E. HAIGLEY, *Subscriber.*

N. B.—No agent has authority to alter the foregoing printed form of agreement in any way. No alteration or addition thereto shall be effective unless countersigned by an officer of the Company at the Home Office, Nos. 30-34 West 33d Street, New York City.

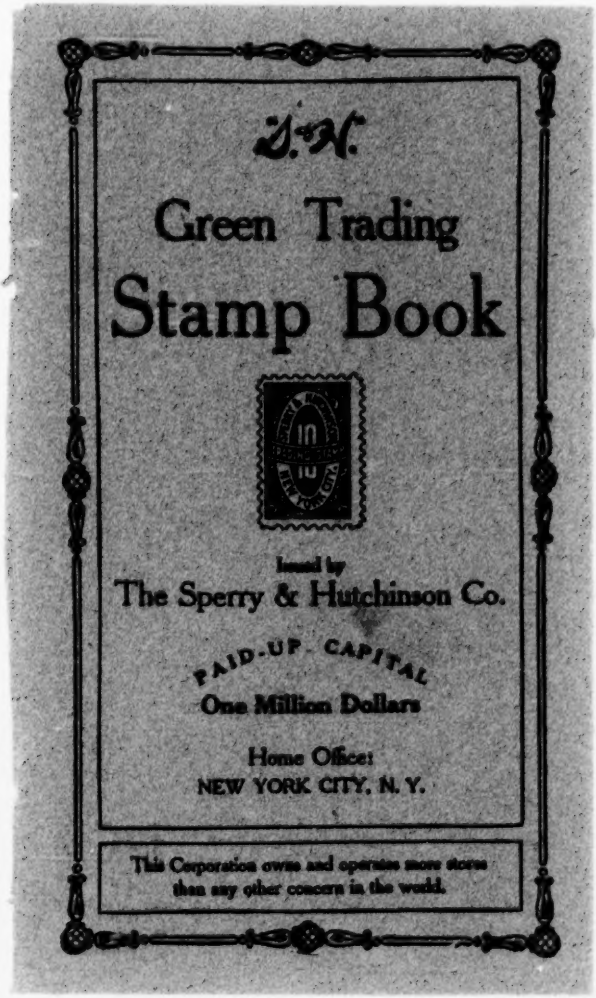
This contract is still in force, and said defendant, on behalf of said Company, has heretofore entered into other similar agreements with numerous other merchants in said City and District, and more than two hundred and fifty of such contracts are now in effect.

The tokens or stamps referred to in said contract are as follows:

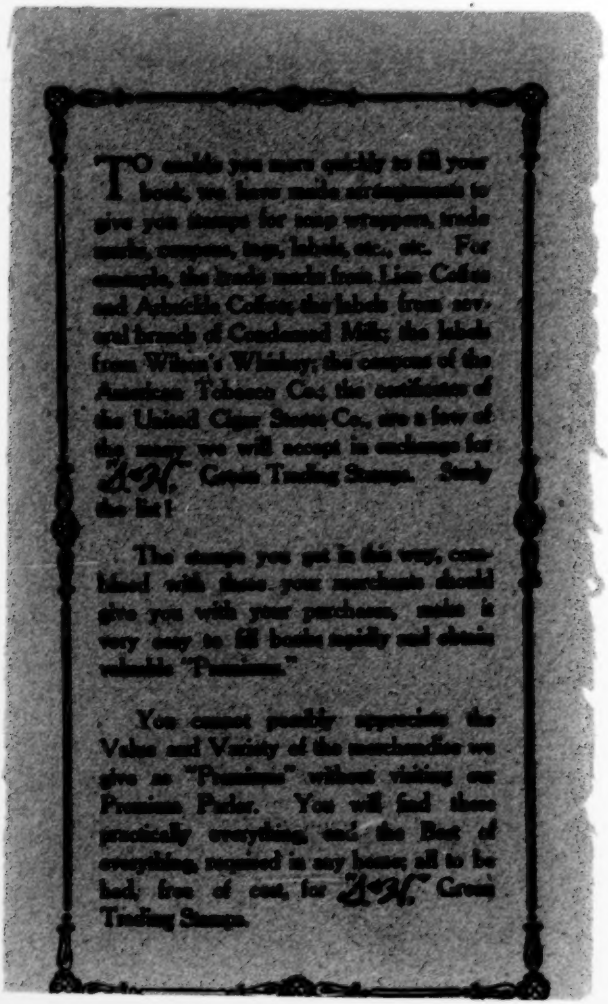
On the back of each of said stamps the following appears, viz:



The first page of said stamp book reads as follows:



The second page of said stamp book reads as follows:

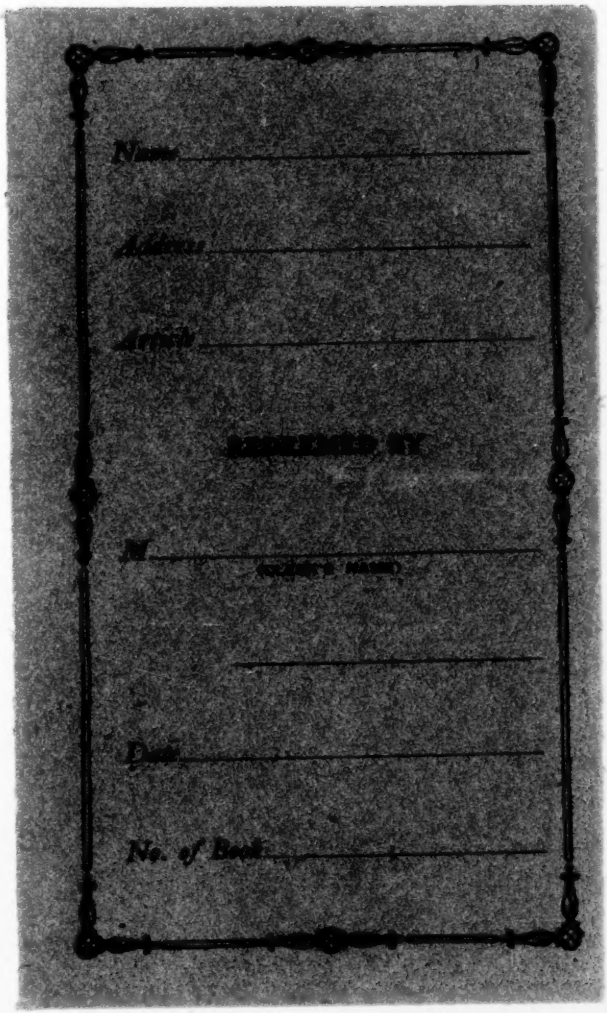


TO enable you more quickly to fill your book, we have made arrangements to give you stamps for soap wrappers, trade marks, coupons, tags, labels, etc., etc. For example, the trade marks from Lion Coffee and Arbuckle Coffee; the labels from several brands of Condensed Milk; the labels from Wilson's Whiskey; the coupons of the American Tobacco Co.; the certificates of the United Cigar Stores Co., are a few of the many we will accept in exchange for "S. H." Green Trading Stamps. Study the list!

The stamps you get in this way, combined with those your merchants should give you with your purchases, make it very easy to fill books rapidly and obtain valuable "Premiums."

You cannot possibly appreciate the Value and Variety of the merchandise we give as "Premiums" without visiting our Premium Parlor. You will find there practically everything, and the Best of everything required in any home, all to be had free of cost, for "S. H." Green Trading Stamps.

On the last page, but one, of said stamp book occurs the following:



On the last page of said stamp book is printed the following:

"*Notice*

To the Public and to the Customers of Our Subscribers.

This book and the trading stamps which are issued by the undersigned are so issued, and are received by you, pursuant to certain restrictions and limitations concerning their use contained in the written contracts made for your benefit between the undersigned and the merchants authorized to re-issue them to their customers. Neither the books nor the stamps are sold to you or the merchant, the title thereto being expressly reserved in the undersigned. They are furnished to you as evidence of payments to our subscribers. The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them or make any other use of them without our consent in writing. We will in every case, where application is made to the undersigned, give you permission to turn over your stamps to any other bona-fide collector of 'S. & H.' Green Trading Stamps; but if the stamps or the books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties. It is to your interest that you fill the book, and personally derive the advantage and benefit of exchanging it for your choice of the many useful and valuable articles supplied by us.

These stamps when received by you must be pasted in the book, as that is a method we have adopted for the purpose of preventing their further use as an advertising medium. Our stamps and premiums are restricted, except as above, to our subscribers and their customers.

THE SPERRY & HUTCHINSON COMPANY,
THOMAS A. SPERRY, *President.*

Paid up Capital, $1,000,000.00.

This book is loaned to

Name .....

Address ....."

On the back of the said trading stamp books the following circular is pasted, viz:

NOTICE TO THE PUBLIC

"S. & H." Green Trading Stamps, the soundest and most equitable of all co-operative profit sharing plans, represent a cash discount on your cash payment, which by contract with our subscribers, we have agreed to pay you.

Our Subscribers in various lines of trade co-operate with each other to give to their customers the same "S. & H." Green Trading Stamp, thus enabling you to get a discount on all your purchases.

By trading with our Subscribers and paying cash, you will receive this discount, and thus co-operate with them, and with us, in our effort to build up their cash business.

Ask for "S. & H." Green Stamps on all cash purchases.

Call at our store, No. 1422 Pennsylvania Avenue, and see the splendid line of goods representing the discount in merchandise to which "S. & H." Green Trading Stamps entitles you; or, if you prefer, you may exchange those issued in Washington, D. C. for cash at the rate of one cent for ten stamps.

On the third page of said trading stamp books occur the following:

ISSUED MAR. 1, 1910.
Reissued from time to time as changes occur

DIRECTORY OF MERCHANTS
IN
WASHINGTON, D. C.
and Vicinity

WHO GIVE "S. & H." Green Trading Stamps

WITH ALL CASH SALES WHEN ASKED FOR

LOCAL BRANCH

1422 PENNSYLVANIA AVENUE
WASHINGTON, D. C.

THE
SPERRY & HUTCHINSON CO. Prop.
THOS. A. SPERRY, President
PAID-UP CAPITAL, $1,000,000.00

Following this third page are fourteen pages of directory giving names and addresses of merchants in the District of Columbia and Hyattsville, Maryland, classified by the kinds of merchandise in which they deal.

This list is followed by fifteen pages under the following heading, viz:

APRIL 1st, 1909.
This List of Tokens, which can be exchanged for Green Trading Stamps, is subject to change without notice. Bring or send them in at once.

The list of tokens includes coupons, trade-marks, labels, soap wrappers, box covers, tobacco tags, &c., from various classes of merchandise, and are arranged as follows:

COFFEES

"A1" Blend	2	" 1 coupon
Arbuckle's Coffee	1	" 1 signature
Autocrat Coffee	1	" 1 coupon
Blanke's "World's Fair Line" Coffee, coupon and center figure from front of package with 20c. cut out of package	1	" 2 "
With 25c	1	" 1 "
" 30c	2	" 1 "
" 35c	3	" 1 "
" 40c	4	" 1 "
" 45c	5	" 1 "
Boardman's Crest Coffee, " Putnam Coffee, " Gold Star Coffee	1	" 2 whole coupons or value thereof
C.F.Bonsor & Co "Perfection Brand"	1	" 5 "
Climax Coffee	1	" 2 "
"Elite" (or the value thereof)	2	" 1 "
German-American Coffee	1	" 1 Whole Libr'y Slip or value thereof
"Golden Staff" (or value thereof)	2	for 1 coupon
"Highland" (or value thereof)	2	" 1 "
"Karang" Java Coffee (whole check or the value thereof)	1	" 1 pr's'nt check
Lion Brand Coffee	1	" 1 trade mark
Montague Extra Blended Coffee	1	" 2 coupons
"National" (or the value thereof)	2	" 1 "
"New Era" (or the value thereof)	2	" 1 "
"Ourico" Coffee	1	" 2 "
Quick Snap Coffee put up by John Bowen, Allentown, Pa	1	" 1 bag front
Royal Blend, Leader	1	" 1 coupon
Star Coffee	1	" 1 coupon
Sphinx Blended Coffee	2	" 1 "
Union Club Coffee	1	" 1 "

CONDENSED MILK

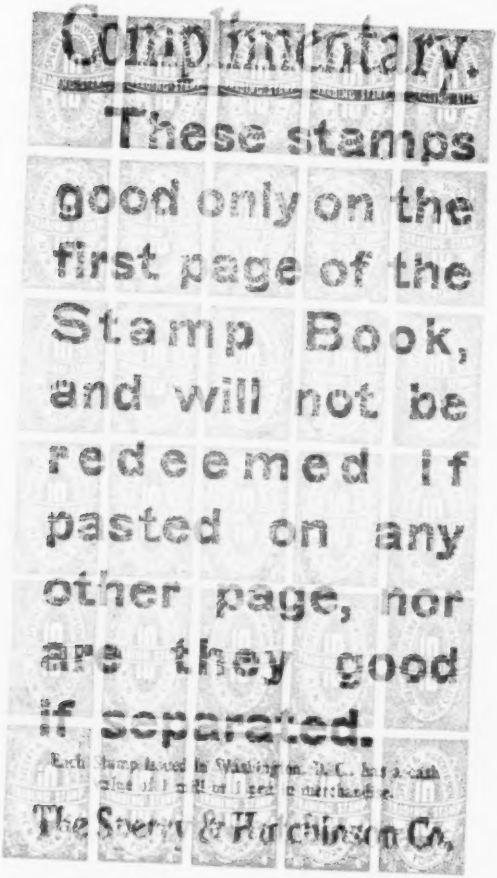
Autocrat Condensed Milk	1	" 3 labels
Banner Condensed Milk	1	" 1 "
Blue Label Condensed Milk	1	" 3 "
Darling Milk	1	" 3 "
Dr. F. W. Lange's Lactated Tissue Food	1	" 1 "
Lion Brand Evaporated Cream	1	" 4 "
Lion Brand Condensed Milk	1	" 2 "
Montague Absolutely Pure Condensed Milk	1	" 2 "
Nestle's Condensed Milk	1	" 2 "

In said trading stamp books there next follows thirty-three pages ruled off into thirty oblong spaces each, otherwise blank.

At the bottom of each of said ruled pages the following appears:

"Place thirty stamps on this page."

On the first of these thirty-three pages there is pasted a sheet representing fac similes of the faces of thirty of said trading stamps upon which said sheet the following is printed, viz:



On the last of said thirty-three pages, over the ruled spaces, the following is printed:

4 Place Thirty Stamps on This Page.

The metal and card advertising signs referred to in said contract are made of sheet steel and card-board respectively, and are furnished by said Company to merchants under contract with it, for display inside and outside their stores. Upon said signs appear the words:

"We give 'S. & H.' Green Trading Stamps.
Ask for them."

Said defendant and said company maintain at No. 1422 Pennsylvania Avenue, Northwest, Washington, District of Columbia, a store and basement in which are exhibited various articles of housefurnishing merchandise, consisting of tables, desks, chairs, beds, mirrors, pictures, rugs, curtains, blankets, silverware, solid gold jewelry, plated ware, cut-glass, musical instruments, carpet sweepers, tennis rackets, baseballs, clubs, fishing tackle, smokers' articles, &c., &c., the value of which exceeds $5,000.

Each of said articles bears a tag upon certain of which appears the following:

"This Premium Given Free
in Exchange for
One Book
Filled with the
Sperry and Hutchinson
Green
Trading Stamps."

Some of said articles have tags showing that they are given for one book or two books, or three, or four, or five, and up to ten books, but no article is so labeled as to show that it will be exchanged except for one full book of 990 stamps, or exact multiple thereof.

Said merchandise is carried by said company for the redemption of its trading stamps when presented, and none of it is sold or for sale.

In addition to said articles of merchandise, said company carries a stock of Falcon pens and cash for the redemption of such of its said stamps as may be presented for redemption in cash or in pens, and nothing else is exchanged except for a full book of 990 stamps or exact multiple thereof.

The store of said company is open during the business hours of each day for the exhibition of said merchandise

and for the redemption of said stamps. At said store are catalogues containing over forty pages of illustrations of the articles carried in said store. These catalogues are distributed free to the public. They show over three hundred different classes of articles, and clearly indicate the number of books of stamps required for each article, and no article is there listed for exchange except for a full book of 990 stamps or exact multiple thereof.

The retail value in Washington of the average article given in exchange for one book of trading stamps is about $2.25, and the same proportionate rate of retail value is maintained for articles given in exchange for more books than one of said stamps.

Said company also employs large numbers of canvassers who go from house to house in the District of Columbia and endeavor to induce householders to trade with and pay cash for purchases to the merchants who have entered into said contracts with said company, and who leave with householders various advertising matter, including said trading-stamp books, circulars, &c., &c.

Said company also prepares attractive circulars for the merchants under contract with it, for the advertisement of their business in connection with the issuance of said trading stamps.

The amount charged for said stamps under said contracts is $3.50 per single thousand, $3.32 per thousand in lots of 5,000, and $3.00 per thousand in lots of 25,000 or more. Said company does not charge for said trading stamp books, trading stamp signs, canvassing, circularising, merchandise or cash given for stamps.

Defendant and said company have been engaged in said business in the District of Columbia continuously from the 20th day of April, 1909, and from that date to November 1, 1909, 3,755,457 stamps have been furnished to merchants under said contracts, and during said period said company has redeemed in Washington, District of Columbia, 421,750 of said stamps.

Said company is engaged in said business in twenty-seven States of the United States, and its trading stamps issued in the District of Columbia or in any State are redeemable (in merchandise only) in the stores of the company in any other State where it carries on business. Many of the stamps issued in Washington, D. C., have been so redeemed in

Baltimore, Maryland, and many there issued have been so redeemed in Washington, District of Columbia.

The defendant and the Sperry and Hutchinson Company are not engaged in the business of selling and do not sell any goods, wares, or merchandise, and do not sell or offer to sell anything whatsoever except the said coupons under the contract above set out. The stock of goods above mentioned is not for sale and no part of the same has been sold at any time nor offered for sale.

The defendant and The Sperry & Hutchinson Company have no contractual or other relation of any sort whatsoever directly with the purchasers of goods from merchants, except as contained in the above-mentioned contract and the notices and other printed matter contained in said trading stamp books, catalogues, &c.

It is further agreed that neither party will take any advantage of the absence of the contracting merchant as a party defendant in this proceeding.

It is further agreed that each customer who receives said stamps, is entitled to the redemption thereof in cash in any number at the rate of 1¢ for 10 stamps, and in pens at the rate of 1 pen for each stamp, or in general household merchandise, as above set forth, in lots of 990 stamps.

It is hereby stipulated that this agreed statement of facts shall be considered as a part of the information in this case and that the defendant shall file a motion to quash the information and the cause will be heard on said motion.

E. H. Thomas,
Corporation Counsel.
A. S. Worthington,
Attorney for Defendant.

"EXHIBIT B."

Thereupon the defendant, by his counsel, A. S. Worthington, Esquire, filed the following motion to quash said information, to wit:

In the Police Court of the District of Columbia.

No. 348,701.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

Now comes the defendant pursuant to the last clause of the paper filed in this cause called agreed statement of facts, and moves the court to quash the information in this case.

A. S. WORTHINGTON,
Attorney for Defendant.

After hearing argument of counsel on said motion the court, afterwards, to wit, on the twenty-seventh day of January, A. D. 1910, sustained said motion to quash the information and discharged the defendant in the following opinion, to wit:

In the Police Court of the District of Columbia.

Information No. 348,701.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

This is a motion to quash an information charging the defendant in general terms with engaging in a certain gift enterprise. Congress by act approved February 17, 1863, entitled: "An Act Prohibiting Gift Enterprises in the District of Columbia," which declared that so much of the act

of the Legislature Assembly as authorized gift enterprises therein and licenses to be issued therefore, is disapproved and repealed and thereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise. The act is brought forward in the R. S. D. C. as section 1176, and section 1177 provides that "any person who shall in any manner engage in any gift enterprise business in the District shall on conviction thereof pay a fine not exceeding one thousand dollars or be imprisoned in jail not less than one nor more than six months or both in the discretion of the court."

The act of the Legislature Assembly defining gift enterprises is as follows:

"The proprietors of gift enterprises shall pay one thousand dollars annually. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with a promise, express or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any other article or thing, whether the object shall be for individual gain or for the benefit of any institution, of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise."

Congress undoubtedly has the power to pass statutes regulating matters affecting the public health, safety, peace and morals of the District of Columbia and it is only where statutes have no real or substantial relation to those objects or is a palpable invasion of the rights secured by the fundamental law, that courts will declare them void.

D. C. *vs.* Lansburgh, Appl., 512.

In Denver vs. Frueaff, 39 Col., p. 20, the court in holding an ordinance defining gift enterprise unconstitutional, said:

"Such definitions are subject to review by the courts as to whether or not when making the same the legislative body has acted within its power and prerogatives as limited by the Constitution. The test of the limit is to be found in the definition of the police power which may be exercised by legislative bodies regulating the conduct of business of others. They can only do so where the business regulated interferes with the public health, public morality or safety.

It cannot be for a moment contended in this case that the business interferes with any of these things unless it be with the public morality, and it would only interfere with the public morality in case it can be successfully shown that the business involves those elements of chance involved in lotteries and gambling. As I said before I cannot see any such element of chance in this business, and if there be no such element in it it cannot possibly interfere with the public morals, and if it does not the city council has no power from any source to prohibit it. If this were not true there would be no safeguards to the liberty of the citizen or his rights to engage in lawful enterprises, or bring about a wholesome competition in business that tends rather to public necessity than to the contrary."

In the trading stamp case of the District of Columbia *vs.* Lansburgh, Chief Justice Shepard in passing upon the act of the Legislative Assembly defining gift enterprises, used this language:

"We do not feel called upon at this time to undertake a specification of the particular conditions in which the act under consideration might or might not apply to actual merchants in the ordinary course and practice of competitive business or to determine just what character of inducements by way of gift or premium may, and may not be held out to purchasers at the time, and as a part of their purchases. That it was not intended to apply to ordinary discounts for cash, or in proportion to amounts of purchases when made by the merchant himself to his customers may be regarded as certain; and the exercise of such power would doubtless be denied if expressly attempted. Nor can it with reason be said to apply to bona fide co-operative associations and the like. It is possible also that it might not be operative in a case where the sale of a lawful article is accompanied by a gift of something specific and certain, not attended with any element of chance, and where the gift is not the real object of the sale.' * * *

And on page 526 lays down the following rule of construction applicable to an interpretation of the statute:

"It would not follow necessarily that the statute should be stricken down in its entirety, because it may be susceptible of an unconstitutional application in certain cases that may possibly arise. This is not reasonable nor is it in accordance with the rule of interpretation adopted by the Supreme Court

of the United States applied to a statute good on its face but where by reason of its general and comprehensive terms it may be made by construction to apply to objects forbidden by the Constitution. In such case the statute will be allowed its full force and operation as applied to all cases rightfully and constitutionally within its provision, but application will be restrained as to those objects simply to which the statute is forbidden to extend."

The conclusion, therefore, is that the scope of this act defining gift enterprises is so broad that it not only forbids matters of common right, beyond the power of Congress to prevent under the guarantees of the Constitution, but also those matters which under the police power Congress clearly has the right to define, prohibit and punish. The question is, does the statement of facts disclose such a scheme of business, where the sale of a lawful article is accompanied by a gift of something specific and certain not attended with any element of chance and where the gift is not the real object of the sale, beyond the power of Congress to prohibit under the limitations of the Constitution and therefore, not within the provisions of the statute.

The defendant is the manager of the Sperry and Hutchinson Company, a private corporation with stores and places of business in twenty-seven States. Said business is conducted in accordance with a contract entered into between the defendant and different merchants of the city. These merchants desiring to increase their cash receipts and cash-paying customers give a rebate or discount upon small payments in cash by giving to each cash-paying customer a stamp which he purchases from the defendant at the rate of $3.50 per one thousand. The merchant gives one stamp for each ten-cent sale of merchandise. These stamps are redeemed in cash or merchandise at any of the stores of the corporation in which are exhibited different articles bearing a tag showing just what will be given for each book of stamps. Each stamp may be redeemed for one falcon pen, ten stamps for one cent, one hundred for ten cents and nine hundred and ninety stamps for $1, or merchandise of the average retail value of $2.50. The defendant also agrees to advertise the stores of the merchants by canvassers who are to go from house to house and who are to distribute at least fifty thousand directories containing their names and business addresses and also to distribute an equal number of trading stamp books and to furnish attractive signs, circulars,

pamphlets and catalogues in connection with the issuance of said trading stamps.

It will be noticed that the business of the defendant is different in several very essential particulars from the Lansburgh case. (1) The stamps issued by the defendant are redeemable in any number from one upward, while those in the Lansburgh case were redeemable only in lots of nine hundred and ninety. (2) The stamps issued by the defendant are redeemable one stamp for a Falcon pen or in cash at the rate of one cent for ten stamps, ten cents for one hundred stamps and one dollar for nine hundred and ninety stamps, while those in the Lansburgh case were not redeemable in any cash payment; and (3) the stamps of the defendant are by the terms of the contract under which they are issued discounted by the merchant to his customers on small payments in cash, while the contract in the Lansburgh case did not so provide.

In the defendant's scheme or plan of business, therefore, there is no element of chance, no appeal to the gambling instinct or anything by which the morals of the community may be affected. At most it might be termed an ingenious device which holds out to the individual customer a way to get something for nothing, but he knows as soon as he is given a stamp, what it can be redeemed for and by inspecting the catalogues or resorting to the premium stores he sees on exhibition the articles tagged which are obtainable by him in exchange for his book of stamps before or after the book is full or obtain their redeemable cash value. It is true a great many stamps may never be redeemed which would be to the profit of the defendant. But this is not his fault. The object of the contractual relation between the merchant and the defendant has been accomplished. The defendant is ready at any time in the future to redeem the stamps for a sum certain or for an article of fixed value and has brought to the merchant a cash-paying customer at the small discount of three and one-half per cent. On the part of the merchant his business is advertised by circulars, directories, and canvassers; new customers are attracted and the old retained, his trade is enlarged and his cash receipts increased.

In State *ex.* Ramseyer, 73 N. H., 40, the court said:

"The Legislative prohibition of a business not harmful to society in any of its essential features, though comparatively novel and peculiar, cannot receive judicial sanction merely because the prohibited business stimulates competi-

tion among merchants in disposing of their wares, or affords an unusual method for commercial advertising.

In the Sperry and Hutchinson Company *vs.* Temple (137 Federal Reporter, 992) which was a trading-stamp case of the defendant company, the court uses this language:

"The trading-stamp business is essentially legitimate, and so far as the court can discover it is the only way in which the small purchaser practically obtains a discount for immediate payment, whether that immediate payment is in cash or anything else. * * * So far as this case is concerned the court is unable to perceive from any proof in the record, or from any suggestion that the business of the complainant is not perfectly legitimate which the legislature has no right to obstruct."

The Sperry & Hutchinson Co. *vs.* Weber, 161 Fed., 219.

Ex Parte Hutchinson, 137 Fed., 950.

The Sperry & Hutchinson Co. *vs.* Brady, 134 Fed., 691.

State *vs.* Shugart, 138 Ala.

Ex Parte McKerma, 126 Cal., 429.

People *vs.* Dycker, 72 Appl. N. Y., 308.

State *vs.* Dalton, 22 R. I., 77.

Young *vs.* State, 101 Va., 853.

State *vs.* Beeson, 135 N. C., 271.

State *vs.* Dodge, 76 Vt., 197, 204.

In the State *vs.* Session, 178 Mass., 578, which was a stamp case specifically prohibiting the use of trading stamps, Justice Holmes (now of the Supreme Court of the United States) said:

"These stamps are given to the purchaser of goods from the merchant and are taken to the store of the stamp company, where they are exchanged for one of a large number of articles that the purchaser may select. These articles are on exhibition all the time, and are of sound value, and the number of stamps necessary to obtain an article is indicated on the article. These articles consist mainly of furniture and household utensils. The value of the article given in exchange for stamps varies in accordance with the number of stamps offered for exchange. In the present case twenty-five stamps were offered in exchange, and a cup and saucer were given by the stamp company for twenty-five stamps. The specific subject of the sale was the hair brush, and the stamps were delivered as a bonus. The merchants who give

stamps for cash trade, display signs in their windows to that effect. Every purchaser knows what he is buying, and can select at the store of the stamp company even before his purchase from the merchant who gives stamps, the article that he wants to exchange for the stamps which are given with the article purchased. * * * *

"So far as appears there was no gambling element in the defendant's transaction and his acts were not prohibited by law."

In State *vs.* Dalton, 22 R. I., 77, the court used this language:

"The thing sought to be accomplished by the vendor is the sale of his goods by means of the inducement held out to the purchaser in the form of a premium and if he may himself give and deliver the premium as he clearly may, he may also give it through a third party. * * * For as already intimated, it can make no possible difference that the article given away with the sale is delivered to the purchaser by a third person instead of the seller himself. We think it is clear that such a prohibition is an unwarranted interference with the individual liberty which is guaranteed to every citizen both of our State Constitution and also by the Fourteenth Amendment of the Constitution of the United States."

My opinion, therefore, is that the business of the defendant is not within the prohibition of the statute and the motion to quash the information is granted.

ALEX. R. MULLOWNY,
Judge Police Court.

Whereupon counsel for the District of Columbia excepted to the rulings of the court on matters of law, which exceptions were duly noted by the court upon his minutes, and thereupon the District of Columbia, by James L. Pugh, Jr., Esquire, Assistant Corporation Counsel, gave notice in open court at the time of said rulings of its intention to apply to a justice of the Court of Appeals of the District of Columbia for a writ of error.

The District of Columbia, by its said counsel, therefore prays the court to settle, sign and seal this its bill of exceptions, which is accordingly done *nunc pro tunc* this 28th day of January, A. D. 1910.

ALEX. R. MULLOWNY, [SEAL.]
Judge of the Police Court of the
District of Columbia.

EXHIBIT C.

(Copy of Docket Entries.)

In the Police Court of the District of Columbia, December Term, A. D. 1909.

No. 348701.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

Information for Violation of Law Relating to Gift Enterprise.

Wednesday, December 29, 1909.—Agreed statement of facts filed with information.

Motion to quash information filed, argued and submitted.

January 27, 1910.—Motion to quash information sustained and defendant discharged.

Exceptions taken to the rulings of the court on matters of law and notice given in open court, by the Assistant Corporation Counsel on behalf of the District of Columbia, at the time of said rulings, of his intention to apply to a justice of the Court of Appeals of the District of Columbia for a writ of error.

January 28, 1910.—Bill of exceptions presented, settled, signed, sealed and filed.

January 31, 1910.—Writ of error received from the Court of Appeals of the District of Columbia.

In the Police Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, N. C. Harper, Deputy Clerk of the Police Court of the District of Columbia, acting in the absence of the clerk, do

hereby certify that the foregoing pages, numbered from 1 to 26, inclusive, *to be* true copies of originals in cause No. 348,701, wherein the District of Columbia is plaintiff and Walter J. Gregory is defendant, as the same remain upon the files and records of said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court, — the City of Washington, in said District, this 9th day — February, A. D. 1910.

[Seal Police Court of District of Columbia.]

N. C. HARPER,
Deputy Clerk Police Court, Dist. of Columbia.

[Endorsed:] No. 348701. District of Columbia *vs.* William B. Kraft. Transcript of Record.

Filed Jan. 31, 1910. F. A. Sebring, Clerk Police Court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable A. R. Mullowny, Judge of the Police Court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Police Court, before you, between District of Columbia, plaintiff, and Walter J. Gregory, defendant, a manifest error hath happened, to the great damage of the said plaintiff as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Court of Appeals of the District of Columbia, together with this writ, so that you have the same in the said Court of Appeals, at Washington, within 15 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Seth Shepard, Chief Justice of the

said Court of Appeals, the 31st day of January, in the year of our Lord one thousand nine hundred and ten.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

Allowed by

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Endorsed on cover: District of Columbia Police Court. No. 2119. District of Columbia, plaintiff in error, *vs.* Walter J. Gregory. Court of Appeals, District of Columbia. Filed Feb. 10, 1910. Henry W. Hodges, clerk.

EXHIBIT D.

In the Court of Appeals of the District of Columbia.

FRIDAY, *April 8th, A. D.* 1910.

No. 2118.

DISTRICT OF COLUMBIA, Plaintiff in Error,
vs.
WILLIAM B. KRAFT,

and

No. 2119.

DISTRICT OF COLUMBIA, Plaintiff in Error,
vs.
WALTER J. GREGORY.

The argument in the above entitled causes was commenced by Mr. W. H. White, attorney for the Plaintiff in Error, and was continued by Mr. F. J. Hogan, attorney for the Defendant in Error in No. 2118.

MONDAY, *April 11th, A. D.* 1910.

No. 2118.

DISTRICT OF COLUMBIA, Plaintiff in Error,
vs.
WILLIAM B. KRAFT,

and

No. 2119.

DISTRICT OF COLUMBIA, Plaintiff in Error,
vs.
WALTER J. GREGORY.

The argument in the above entitled causes was continued by Mr. F. J. Hogan, attorney for the Defendant in Error in

No. 2118, and by Messrs. John Hall Jones and A. S. Worthington, attorneys for the Defendant in Error in No. 2119, and was concluded by Mr. W. H. White, attorney for the Plaintiff in Error.

In the Court of Appeals of the District of Columbia.

No. 2118.

DISTRICT OF COLUMBIA, Plaintiff in Error,
vs.
WILLIAM B. KRAFT.

Opinion.

(Mr. Chief Justice SHEPARD delivered the opinion of the Court.)

The defendant in error, William B. Kraft, was charged by information in the Police Court with engaging in a gift enterprise in violation of an Act of Congress. He moved to quash the information on the following grounds: First, it does not set forth an offence against any law or regulation; second, so far as the Act attempts to prohibit the acts charged it is unconstitutional.

The motion was sustained, and a writ of error applied for by the District of Columbia has been granted.

The business in which Kraft was engaged is that of issuing and redeeming what are called "trading stamps" in the same general manner described in the report of the case of Lansburg vs. District of Columbia (11 App. D. C. 512) decided December 7th, 1897. Lansburg, a retail merchant of the District and Joseph A. Sperry, managing officer of a trading stamp company, a corporation of New York, were jointly charged with engaging in a gift enterprise in violation of the same statute under which Kraft has been prosecuted. On August 23d, 1871, the then Legislative Assembly of the District made the following enactment:

"The proprietors of gift enterprises shall pay one thousand dollars ($1000) annually. Every person, who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement,

with the promise expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise: Provided, that no such proprietor, in consequence of being thus taxed shall be exempt from paying any other taxes imposed by law, and the license herein required shall be in addition thereto."

After less than two years of experience of license, Congress, on February 17th, 1873, repealed the license clause of the aforesaid enactment, and prohibited the business under a penalty. (17 Stat., 464.) Subsequently said act was embodied in the Revised Statutes of the District of Columbia in sections 1176 and 1177 thereof. These read as follows:

"SECTION 1176. So much of the Act of the Legislative Assembly of the District of Columbia entitled 'An act imposing a license on trades, businesses and professions, practiced or carried on in the District of Columbia,' approved August 23d, 1871, as authorizes gift enterprises therein, and the license to be issued therefor, is disproved and repealed, and hereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise."

"SECTION 1177. Every person who shall in any manner engage in any gift enterprise in the District shall on conviction thereof in the Police Court on information filed for and on behalf of the District pay a fine not exceeding one thousand dollars ($1000) or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the Court."

In Lansburg *vs.* D. C., *supra*, it was held: 1. That this statute was within the police power of Congress under its exclusive jurisdiction over the District of Columbia: 2. That it was not too broad in its scope of inclusion of prohibited acts to constitute a valid exercise of the power of Congress: 3. That the acts charged constituted engaging in the business of a gift enterprise within the meaning of sections 1176 and 1177, R. S. D. C. In respect of this last conclusion it was said (p. 520): "Without the necessity of declaring that the acts proved in this case constitute the conduct of a lottery

or gift enterprise, as these words are commonly understood, or even of finding that the element of chance operates intentionally and distinctively in the scheme of the trading stamp company, we think, nevertheless, that they come within the prohibition of the statute, which, as before said, furnishes its own definition of 'gift enterprise.' Although one of the most shrewdly planned of the many devices to obtain something for nothing, and one apparently novel, it could hardly have come more clearly within the scope of the statute had it been well known and expressly within the contemplation of Congress at the time of the enactment."

The scheme denounced in that case was substantially this: The trading stamp company entered into a contract with a retail dealer in merchandise to print in the directory of their subscribers' book the name, business and address of the merchant. To distribute 100,000 copies of said book to the people of Washington and to explain the use of the same. The merchant to take from the company sufficient stamps to supply all demands for the same, to issue one to the purchaser for each ten cents' worth purchased and to display the sign, "We give trading stamps," in a conspicuous place in his store. The merchant was to pay $5 per thousand for said stamps.

Purchasers receiving stamps from the merchant were required to paste the same in places provided in said books. When 990 stamps had been received and entered in a book, the trading stamp company obligated itself to exchange therefor any one of a great variety of articles kept by it on exhibition in a store for the purpose. No articles were kept for sale, but only for exchange for tickets when presented in the manner and to the number aforesaid. No stamps were redeemed in cash or in quantity less than 990.

The first contention of Kraft is, that his business is different from that described above, by reason of which difference he is not within the inclusion of the decision in that case.

The differences alleged are these: (1) Kraft's company is a co-operative association: (2) Stamps are redeemable at the option of the purchasing member of the association in cash at the rate of one cent for five; five bringing one cent.

The agreed statement of facts shows that David Rothchild, Wallace J. Hill, and William B. Kraft obtained a charter in the State of Virginia under the name of the

Economy Co-operative Society authorizing them to engage in said business. The authorized capital stock was $10,000.00 divided into 100 shares. The incorporators were named as directors for the first year, and Rothschild was made president, Hill vice-president, and Kraft, secretary and treasurer. These and one Berlinger are the only stockholders of the corporation.

The so-called co-operative feature was provided for in the by-laws of the corporation. A co-operative society was to be organized, the corporation officers to be officers thereof. Any person may become a member by paying annually in advance a fee of twenty-five cents. Members are entitled to receive a discount of a certain per cent on all cash purchases from merchants under contract with the corporation to purchase and distribute the discount vouchers. Members are entitled to exchange discount vouchers (stamps) for merchandise displayed at the corporation office on the basis of the actual cost price of such merchandise to the corporation. Membership fees shall be kept separate from other income of the corporation, and on the first Monday of January of each year a dividend shall be declared and paid to members from any surplus thereof that may remain after payment of expenses necessarily incidental to the procurement of new members "and nothing more." No part of the salaries of officers to be charged to this fund. The fund is to be charged only with commissions paid to agents for procuring new members. Members have no right to dividends received from the sale of vouchers (stamps) to merchants. These go to the stockholders of the corporation only.

The contracting merchants receive the stamps or vouchers from the corporation at the rate of $3.50 per thousand. These are to be issued to members making purchases, who are required to produce their membership cards when demanded. Members only can have the stamps redeemed. One stamp is to be given with each ten cent purchase. Members are entitled to purchase the displayed articles with their stamps, or to have them redeemed in cash at the office of the corporation "in any quantity from five upward, in actual cash, and at their face value, viz., 2 mills each." As regards the issue of stamp books, directories of contracting merchants, etc., the scheme is of the same general character as that described in the Lansburg case. The statement of facts fur-

ther shows that the corporation has been engaged in business since July 10th, 1908. Between that date and October 1, 1909, 8,095,000 discount vouchers, or stamps, have been sold to merchants at $3.50 per thousand, 344,000 have been redeemed in cash, and 5,372,000 in exchange for articles of merchandise on display at the corporation's office. Counsel for Kraft stated on the argument that the charter and by-laws of the corporation had been written "with pen in one hand and the Lansburg decision in the other," so as to bring the scheme within lines declared therein not to be prohibited by the statute. The part of the opinion referred to reads as follows: "We do not feel called upon at this time to undertake a specification of the particular conditions in which the act under consideration might or might not apply to actual merchants in the ordinary course and practice of competitive business, or to determine just what character of inducements by way of gift or premium, may or may not be held out to purchasers at the time, and as a part of their purchases. That it was not intended to apply to ordinary discounts for cash, or in proportion to amounts of purchases when made by the merchant himself to his customers, may be regarded as certain, and the exercise of such power would doubtless be denied if expressly attempted. Nor can it with reason be said to apply to bona fide co-operative associations and the like. It is possible, also, that it might not be operative in a case where the sale of a lawful article is accompanied by a gift of something specific and certain, not attended with any element of chance, and where the gift is not the real object of the sale, in an attempt to evade acts regulating or prohibiting a particular traffic, as, for example, in the case of Lauer *vs.* The District of Columbia (11 App. D. C., 453)."

Assuming that the statute does not apply in the case of bona fide co-operative associations, or of merchants making discounts or presenting actual articles directly to their customers, we fail to see that the co-operative association belongs in either class. We will consider, first, the co-operative feature. In a general sense a co-operative society or corporation is one organized on the principle of a joint stock company, where the members share in the profits in proportions to their contributions, and may or may not obtain a discount on their individual purchases. This society is clearly not one of that kind. The admitted members pay a

fee of twenty-five cents annually for the privilege of receiving stamps on their purchases—a privilege which the other corporation, whose case has been heard with this, extends to all persons without charge. But these members are rigidly excluded from any participation in the profits of the corporation; that goes to its stockholders exclusively. These profits accrue from the sale of stamps to the merchants. A rough estimate of these profits according to the statement of the stamps sold and redeemed during a little more than one year since the organization of the corporation, shows that they amount to about $12,000.00. All that a member of this so-called co-operative society gets back is his membership fee, less its proportion of the cost of obtaining members. The only benefit they are supposed to obtain is the redemption price of the stamps received on their several purchases from merchants dealing in the stamps, which benefit is extended, without charge, by other stamp companies, as we have seen, to all purchasers from merchants handling their stamps. This system falls far short of constituting a bona fide co-operative society. The only other substantial difference between this scheme and that declared unlawful in the Lansburg case is this: In that case there was no redemption of stamps in cash, or in less quantities than 990; in this the stamps sold for $3.50 per thousand are redeemable in cash at the option of the holders at the rate of $2.00 per thousand, and in any quantity not less than five. This feature makes the scheme more advantageous than the other, but does not differentiate it. In substance they are the same.

A vigorous attack has been made on the Act as unconstitutional, because it is an unreasonable interference with the freedom of trade and contract. While that question was decided in the Lansburg case, we are asked to reconsider it on the ground that the soundness of that decision has been denied in many cases in other jurisdictions. We have carefully examined those decisions and find that very few of them go to the extent claimed for them. They may be separated into the following classes: (1) Those in which the statute involved prohibited lotteries and gift enterprises without defining the acts constituting the same; and it was held that the giving of trading stamps was neither a lottery nor a gift enterprise within the ordinary meaning of the

terms. State *vs.* Shugart, 138 Ala., 86; Humes *vs.* City of Little Rock, 138 Fed., 929.

(2) Cases holding that statutes prohibiting merchants from giving premiums, vouchers, gifts, etc., to purchasers of their goods, are in excess of legislative power. State *vs.* Dalton, 22 R. I., 77; State *vs.* Gilson, 109 N. Y., 389; State *vs.* Dodge, 76 Vt., 197; *Ex parte* Drexel, 147 Cal., 763; State *vs.* Ramseyer, 73 N. H., 31; Leonard *vs.* Bassingale, 46 Wash., 301; Young *vs.* Com., 101 Va., 853.

In some of those cases the court went beyond the question actually involved and declared that the trading stamp business of third parties could not be lawfully prohibited. In others as in State *vs.* Dalton, the court expressly limited its decision to the case of the merchant giving premiums, and declined to say that the legislature might not prohibit the business of trading-stamp companies.

(3) Cases analogous to those in class 1, which hold that the statute did not apply to the giving of premiums, simply, because it was limited to those which embraced a gambling feature. Com. *vs.* Emerson 165 Mass. 146; Com. *vs.* Sisson 178 Mass. 578.

(4) Cases in which the statute or municipal ordinance imposed a license tax; some holding that the power to license had not been conferred on the municipality; some that the exercise of the power in the particular case was unreasonable and oppressive; others, that as applied to a licensed merchant, the license requirement was inapplicable, because the giving of premiums by such merchants was but an incident of their regular business and not a separate business as such. Winston *vs.* Beeson 135 N. C. 271; Hewin *vs.* Atlanta 121 Ga. 723-729; *Ex parte* Hutchinson 137 Fed. 949; *Idem* 950; Com. *vs.* Gilson 125 Ky. 440; City of Montgomery *vs.* Kelly 142 Ala. 552.

In some of these the courts expressly declined to pass upon the legality of the trading stamp business, which question was not involved. (121 Ga. 729.) The case of O'Keefe *vs.* Somerville, 190 Mass. 110, may be put in this class, but there the license tax was held unconstitutional, because the trading stamps were not "goods, wares, merchandise or commodities" to which the special taxing power was limited by the constitution of Massachusetts. See also State *vs.* Walker 105 La. 492, in which a statute prohibiting trading stamps, etc. was held unconstitutional, because the object of the Act

was not expressed in the title as required by a provision of the State Constitution.

(5) Cases of injunction by trading stamp companies against others interfering with their business. Sperry Co. *vs.* Brady 134 Fed. 691; Spery Co. *vs.* Temple 137 Fed. 992; Sperry Co. *vs.* Weber Co. 161 Fed. 219. No prohibitory statute was involved.

(6) Cases in which the validity of legislation prohibiting the trading stamp business was discussed and involved and expressly denied. *Ex parte* Drexel 147 Cal. 763. Leonard *vs.* Bissengale 46 Wash. 301; Denver *vs.* Frueauff 39 Col. 20. The California and Washington cases appear to us to involve nothing more than the particular question stated in class 2 *supra*, and for that reason are arranged thereunder. The general question of the power to prohibit trading stamp concerns, as such, was not necessarily involved. In the Colorado case, the City ordinance went beyond the power conferred by the Constitution and an Act of the Legislature which were limited to "lotteries" and "gift enterprises," neither of which terms embraced the giving of trading stamps as premiums on purchases. This point was the only one necessarily involved, and the case is in fact identical with that of Winston *vs.* Beeson (Class 4, *supra*). A recent decision of the Supreme Court of Minnesota seems to decide the question directly. State *vs.* Spery Co. (Opinion).

Of the cases cited on behalf of the District of Columbia, but one directly upholds the doctrine of the Lansburg case, which is quoted from and approved. Humes *vs.* City of Fort Smith 93 Fed. 857; State *vs.* Hawkins 95 Md. 133 does not involve the direct question presented here.

Before proceeding to consider the question necessarily involved in this case in the light of some applicable decisions of the Supreme Court of the United States relating to the exercise of the Police power limiting the freedom of contract, we will briefly consider a point that has been relied on as showing the legitimate character of the trading stamp business. It has been argued, and in some of the cases cited, it has been suggested, that the trading stamp companies are engaged in advertising the merchants contracting with them; and it is contended that this business, in that respect, is similar to that of the ordinary newspaper. Certainly, the right of the advertiser and the newspaper to contract for this purpose has never been questioned. The newspaper is a time honored institution indispensable in civilized society.

It gives the current news on all subjects of public interest, and in addition opens its pages to advertisers. The merchant purchases his space and presents the advantages of his business. Undoubtedly the cost of this advertising is an expense that must be added to the cost of carrying on the business, and borne along with other incidental expenses. No way can be devised by which the cost of transportation and the legitimate handling of produce or goods in the transfer from purchaser to consumer can be entirely eliminated.

In the case at bar the advertising feature is a mere pretense; it is of the stamp dealer rather than of the merchant. To induce the purchase of stamps, the stamp company circulates many copies of its books which contain a directory of the names and locations of the merchants under contract with it to deliver its stamps with purchases. It is a notice to these persons where they can procure stamps, and where and how they can procure the redemption of the same when obtained. This is of prime importance to the Stamp Company. The trading stamp concerns are not engaged in the advertising business or as agents for advertisers. As said in the Lansburg case, they "are not merchants engaged in business as that term is commonly understood. They are not dealers in ordinary merchandise, engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is the exploitation of nothing more or less than a cunning device. With no stock in trade, but that device and the necessary books and stamps and so-called premiums, they have intervened in the legitimate business carried on in the District of Columbia, between seller and buyer, not for the advantage of either, but to prey upon both. They sell nothing to the person to whom they furnish the premiums. They pretend simply to act for his benefit by forcing their stamps upon a perhaps unwilling merchant. The merchant who yields to their persuasion does so partly in the hope of obtaining the customers of others, and partly through fear of losing his own, if he declines." We see no reason for withdrawing or qualifying the foregoing observations in the light of the evidence in this case, for as said before, the businesses are the same notwithstanding some immaterial differences. It has been argued that there was no evidence to show that the stamps were forced upon perhaps unwilling merchants. That is true, but the courts may take notice of evident conditions and results of trades and business. That merchants

are unwilling to enter into the scheme and regard the same as an unjustifiable imposition, is borne out by the charge made in the same argument that certain merchants of the District had employed counsel who had aided the Corporation counsel in the preparation of these cases. This charge would not have been made, if unsupported by the facts; and it was not denied. The Police Power of Congress in the District of Columbia, upon the exercise of which this Statute rests, is substantially the same under the 5th Amendment, as that which may be exercised by the states under the limitations of the 14th Amendment. As was said in the Lansburg case: "The comprehensive scope of the Police Power, as exercised in our day, and under our constitutional form of government has been developed by the process of evolution. Rapid increase in population, wonderful inventions, from time to time, followed by vast material development and advances in the arts of civilization, have introduced novel situations and begotten difficulties for the solution of one generation, that were unanticipated, and often undreamed of even, by the most advanced minds of the generation next preceding. As a necessary consequence the boundaries of the Police Power in its application to the property, business and personal liberty of the citizen have never been definitely settled so as to furnish a certain guide for all cases that may present themselves for legislative or judicial determination." This idea has been better expressed by Materlinck in "The Life of the Bee" in the form of a fundamental principle of social development. He says: "In proportion as society organizes itself and rises in the scale, so does a shrinkage cheer the private life of each one of its members. Where there is progress, it is the result, only, of a more and more complete sacrifice of the individual to the general interest." See Otis *vs.* Parker 187 U. S. 606-609; McGuire *vs.* Railway, 131 Iowa, 340-354.

Hence: "It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself, which will be in all respects accurate." Stone *vs.* Miss., 101 U. S., 818. In a later case it was said: "It is undoubtedly true that it is the right of every citizen of the United States to pursue any lawful trade or business, under such restrictions as are imposed upon all persons of the same age, sex and condition. But the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the gov-

erning authority of the country essential to the safety, peace, health, good order, and morals of the community. Even liberty itself, the greatest of all rights, is not an unrestricted license to act according to one's own will. * * * The right to acquire, enjoy, and dispose of property is declared in the constitutions of the several States to be one of the inalienable rights of man. But this declaration is not held to preclude the legislature of any State from passing laws respecting the acquisition, enjoyment, and disposition of property, what contracts respecting its acquisition and disposition shall be valid, and what void or voidable; when they shall be in writing or when they shall be made orally; and by what instruments it may be conveyed or mortgaged, are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment of others of their property. *Sic utere tuo ut alienum non laedas*, is a maxim of universal application. For the pursuit of any lawful trade or business the law imposes similar conditions. Regulations respecting them are almost infinite, varying with the nature of the business." Crowley *vs.* Christensen, 137 U. S., 86-89.

That there are bounds to forced individual "shrinkage" in order to prevent its development into sheer arbitrary oppression and tyranny under our system of government, all must admit. The difficulty lies in the practical ascertainment of those boundaries. The legislature is the judge in the first instance, but when its act is an unmistakable invasion of individual liberty and right, the courts will intervene to arrest its enforcement. In a recent case, a statute of a State was upheld which made it unlawful to screen coal dug by miners before weighing the same for determining their compensation, and prohibiting them from waiving the benefit of the act by contract with the mining company. McLean *vs.* Arkansas, 211 U. S., 539. After referring to Allgeyer *vs.* Louisiana, 165 U. S., 578—a case strongly relied on by the defendant in error—it was said by Mr. Justice Day, who delivered the opinion of the majority of the Court, (p. 545) "But in many cases in this court the right of freedom of contract has been held to be not unlimited in its nature, and when the right to contract or to carry on business conflicts with laws declaring the public policy of the State, enacted for the protection of the public health, safety,

and welfare, the same may be valid, notwithstanding they have had the effect to curtail or limit the freedom of contract. It would extend this opinion beyond reasonable limits to make reference to all the cases in this court in which qualifications of the right of freedom of contract have been applied and enforced." Some of those cases will be mentioned later. He then quotes the following extract from Gundling *vs.* Chicago, 117 U. S., 183: "Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply are questions for the State to determine, and their determination comes within the proper exercise of the police power of the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference." The learned justice then proceeds with the discussion as follows: "It is then the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the Government in the exercise of its power to protect the safety, health, and welfare of the people. It is also true that the police power of the State is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as the right of judicial interference itself. The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power." See also Williams *vs.* Arkansas, April 4th, 1910. One of the cases reviewed in McLean *vs.* Arkansas is not distinguishable in principle from the case at bar. Knoxville Iron Co.

vs. Harbison, 183 U. S., 13. In that — it was held that an act of the legislature of Tennessee, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due employees, did not conflict with any provision of the Constitution of the United States protecting the right of contract. Had the statute in this case, instead of prohibiting the business, required redemption to be made in cash at the rate of the purchase price of the stamps, it would have been practically identical with the State statute upheld in that case; and yet its effect, by destroying the profits of the trading-stamp association, would necessarily be to put an end to the business.

The whole country is now agitated by the increased cost of living that has grown to alarming proportions, and legislative bodies are inquiring into its causes with a view, if possible, of providing remedies for the mischief. While there is difference of opinion as regards the chief source, all concur in the opinion that every introduction of superfluous middlemen, and consequent unnecessary charges between producer and consumer undoubtedly contribute to swell the stream to overflowing. Had the statute under consideration been passed at the present session of Congress, it would be regarded as intended to promote the public welfare in this respect. Though enacted many years ago when mischief was not great, it answers the purpose of today.

Now what are the conditions presented by the facts in this case? An entirely unnecessary middleman for his own profit solely, has injected himself between the regular merchant on the one hand, and his customers on the other. He receives $3.50 for every thousand stamps issued to the customers and redeems such as may be presented, in goods or in cash at $2.00 per thousand. By this means the corporation represented by the defendant in error has in the first year of its intervention received about $12,000.00, which should have either been retained by the merchant or received by the customers.

Several other concerns being engaged in the same business, their profits are probably as great if not greater. We have then this large sum of money annually taken from the merchant and his customers and added to the gross cost of living of all of the people of the District, without return. Is it not for the public welfare, in the judicial sense of the term, to prohibit such an undertaking? We think that it is.

Must this public welfare be sacrificed to the unlimited freedom of contract invoked in this case to protect the right to prey upon local commerce? We think not.

With this we will close a discussion that has been carried to an unusual length. Our excuse is the importance of the principle involved, and the great conflict of authority relating to it, which may furnish ground for a writ of certiorari to remove the case to the Supreme Court of the United States, where alone, the vexed question may be settled.

It follows that the Police Court erred in sustaining the motion to quash the information, and its judgment must, therefore, be reversed with costs, and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

SETH SHEPARD,
Chief Justice.

Mr. Justice Van Orsdel, dissenting.

(Endorsed:) No. 2118. District of Columbia, Plaintiff in Error, *vs.* William B. Kraft. Opinion of the Court per Mr. Chief Justice Shepard. Court of Appeals, District of Columbia. Filed May 10, 1910. Henry W. Hodges, Clerk.

No. 2118.

Mr. Justice VAN ORSDEL, dissenting:

I cannot agree with my associates that the business here under investigation is embraced within the terms of the statute. I am of opinion that the transaction between the merchant and the customer merely amounts to a discount allowed the purchaser on account of the purchase made. The purchaser receives an order, on presentation of which, according to its terms, he can receive his discount, either in cash or merchandise. Between the merchant and the stamp company, the contract is clearly one for advertising. I agree with what is said by my associates in regard to the ancient and legitimate method of advertising through the medium of the newspaper, but I am unable to distinguish it from many other equally legitimate methods of advertising—the bill-board, the distribution of circulars, the various methods adopted through the different kinds of directories, and the numerous other agencies, all alike conducted and solicited

through the agency of third parties intervening between the merchant and his customers. It is true that competition compels the merchant to patronize these agencies, and the public to pay the expense. Deception is at times practiced through these methods. It is not apparent, however, from the record before us that any fraud has been practiced or misrepresentation made by the Economy Co-Operative Society. The public need not be deceived nor defrauded by this system of discount. The purchaser has his option of taking either cash or merchandise, or refusing both. Neither inconvenience nor delay in securing the discount are in themselves sufficient to bring the transaction within the limitations of the statute.

The system detailed by the record discloses neither a gift enterprise nor a lottery. Every stamp exchanged has a fixed value: and the mere fact that the transaction is conducted through the medium of a third party does not make it different from a direct payment of the discount by the merchant, or the giving of a stamp redeemable by him on presentation. It is conceded that the merchant himself could legally issue the stamps, redeemable by him in cash or merchandise, as an inducement to secure the patronage of the public. Such a transaction would be perfectly legitimate. Exactly the same result is here accomplished. The same discount is paid, and the customer is accorded the same rights. The advertising is conducted, as is customary, through the medium of a third party. The right of the merchant to so advertise cannot be controverted. With this neither the customer nor the public is concerned. The customer receives the exact inducement offered, an inducement which, so far as the transaction between the merchant and the customer is concerned, is not condemned by the statute. The mere fact that the purchaser is required to take the stamps for redemption to another point, in no way affects the legality of the transaction.

In my opinion, the question of the constitutionality of the statute is not before us, as the matter here involved cannot be brought within its provisions. Such statutes are to be strictly construed, and no reasonable construction of this statute can bring the transaction here involved within its provisions. It is unnecessary to discuss in this connection the power of Congress, under the exercise of the police power, to regulate or suppress these stamp enterprises, since that

question, in my judgment, is not here presented. The mere fact that the profits of the business have been large, or that a middleman is involved, is not sufficient to bring it by implication within the terms of the statute.

In view of the importance of the question involved, and the wide diversity of opinion among the courts of the country as to the effect of the statute and the power of the legislature to regulate the business in question, I join with my associates in inviting the allowance of a writ of *certiorari* by the Supreme Court.

TUESDAY, *May 10th, A. D.* 1910.

No. 2118, April Term, 1910.

DISTRICT OF COLUMBIA, Plaintiff in Error,
vs.
WILLIAM B. KRAFT.

In Error to the Police Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Police Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Police Court in this cause be, and the same is hereby, reversed with costs; and that this cause be and the same is hereby remanded to the said Police Court for further proceedings in conformity with the opinion of this court.

Per Mr. Chief Justice SHEPARD.

May 10, 1910.

Mr. Justice Van Orsdel dissenting.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 33, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of District of Columbia, plaintiff in error, *vs.* William B. Kraft, No.

2118, April Term, 1910, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 13th day of May, A. D. 1910.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals
of the District of Columbia.

EXHIBIT E.

(*Mandate.*)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Police Court of the District of Columbia, Greeting:

Whereas, lately in the Police Court of the District of Columbia, before you or some of you, in a cause between the District of Columbia, plaintiff, and Walter J. Gregory, defendant, Information No. 348,701, wherein the judgment of the said Police Court entered in said case on the 27th day of January, A. D. 1910, is in the following words, viz:

"Motion to quash information sustained and defendant discharged,"

as by the inspection of the transcript of the record of the said Police Court, which has brought into the Court of Appeals of the District of Columbia by virtue of a writ of error, agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of April, in the year of our Lord one thousand nine hundred and ten, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Police Court in this cause be, and the same is hereby reversed with costs; and that the said plaintiff recover against the said defendant, Walter J. Gregory, Forty dollars and eighty cents for its costs herein expended and have execution therefor. And it is further ordered that this cause be, and the same is hereby, remanded to the said Police Court for further proceedings in conformity with the opinion of this Court.

May 10, 1910.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause in con-

formity with the opinion and judgment of this Court as according to right and justice and the laws of the United States ought to be had, the said writ of error notwithstanding.

Witness the Honorable Seth Shepard, Chief Justice of said Court of Appeals, the 1st day of November, in the year of our Lord one thousand nine hundred and ten.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Costs of Plaintiff in Error.

Clerk	$13.30
Printing record	27.50
	$40.80

Endorsed on back: Court of Appeals of the District of Columbia. No. 2119, October Term, 1910. District of Columbia, Plaintiff in Error, *vs.* Walter J. Gregory. Mandate. Filed Nov. 1, 1910. F. A. Sebring, Clerk Police Court, D. C.

In the Police Court of the District of Columbia, December Term, 1909.

No. 348,901.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

Information for Violating Law Relating to Gift Enterprises.

The defendant, Walter J. Gregory, having in open court admitted the truth of all of the statements contained on the agreed statement of facts, heretofore filed herein, it is this third day of November, 1910, agreed and stipulated by and between the defendant, by his attorney, and the District of Columbia, by its attorney, that the case shall be submitted to the judge presiding in said court upon said agreed statement of facts.

A. S. WORTHINGTON,
Attorney for Defendant.
EDWARD H. THOMAS,
Corporation Counsel and Attorney for the District of Columbia.

EXHIBIT F.

(Copy of Docket Entries.)

In the Police Court of the District of Columbia, December Term, A. D. 1909.

No. 348,701.

DISTRICT OF COLUMBIA
vs.
WALTER J. GREGORY.

Information for Violation of Law Relating to Gift Enterprise.

Wednesday, December 29, 1909.—Agreed Statement of Facts filed with information.

Motion to quash information filed, argued, and submitted.

January 27, 1910.—Motion to quash information sustained and defendant discharged.

Exceptions taken to the rulings of the court on matters of law and notice given by the Assistant Corporation Counsel on behalf of the District of Columbia, in open court, at the time of said rulings, of his intention to apply to a justice of the Court of Appeals of the District of Columbia for a writ of error.

January 28, 1910.—Bill of exceptions presented, settled, signed, sealed, and filed.

January 31, 1910.—Writ of error received from the Court of Appeals of the District of Columbia.

February 10, 1910.—Transcript of record, together with the writ of error, transmitted to the Court of Appeals of the District of Columbia in obedience to said writ.

November 1, 1910.—Mandate received from the Court of Appeals, reversing judgment of the Police Court, with costs, and remanding same to the Police Court for further proceedings.

November 3, 1910.—Defendant arraigned, plea not guilty. Defendant in open court expressly waives his right to trial

by jury and requests that he be tried by the judge presiding. Case submitted to the court on statement of facts heretofore filed, which statement the defendant in open court admits to be true.

Continued to Monday, November 7, 1910.

November 5, 1910.—Stipulation of counsel, submitting case to the judge presiding on agreed statement of facts filed.

November 7, 1910.—The judgment guilty; sentenced to pay a fine of $100., and in default to be imprisoned 150 days in jail.

Committed.

I hereby certify, under the seal of this court, that the foregoing is a true copy of the record of the proceedings had in the Police Court in the above-entitled case.

[Seal Police Court of the District of Columbia.]

N. C. HARPER,
Deputy Clerk, Police Court,
District of Columbia.

EXHIBIT G.

In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA,
County of Washington, To wit:

To the warden of the jail of the District of Columbia:

Receive into your custody the body of Walter J. Gregory, herewith sent by the Police Court, brought before said court charged upon oath with violation of the law relating to gift enterprise; and being convicted and sentenced to pay a fine of one hundred dollars, and in default to be imprisoned one hundred and fifty (150) days in jail; and being in default, him therefore safely keep in your said custody until he shall be discharged by due course of law; and for so doing this shall be your sufficient warrant.

Witness the Hon. James L. Pugh and the Hon. Alexander R. Mullowny, judges of the Police Court of the District of Columbia, and seal of said court this seventh day of November, in the year of our Lord one thousand nine hundred and ten.

N. C. HARPER,
Deputy Clerk, Police Court, D. C.

I hereby certify, under the seal of this court, that the foregoing is a true copy of the order of commitment in the case of District of Columbia *v.* Walter J. Gregory, No. 348,701, in the Police Court of the District of Columbia, December term, A. D. 1909.

[Seal Police Court of the District of Columbia.]

N. C. HARPER,
Deputy Clerk, Police Court, D. C.

[redacted]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

Original No. —

In re WALTER J. GREGORY, *Petitioner*

BRIEF.

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1. In support of application for leave to file petition for the writ of *habeas corpus*.

2. In support of motion to admit petitioner to bail pending disposal of his petition in this Court.

I.

(a) THE PROCEDURE HEREIN:

The procedure followed in this case is identical with that followed in—

In re Kollock, 165 U. S., 526.

In re Chapman, 166 U. S., 661.

This is true both as to the manner of presenting our petition; the motion to admit petitioner to bail; the basing of the petition on the unconstitutionality of the statute under which the prosecution below was had, whereby he is deprived of his liberty without due process of law, in violation of the 5th Amendment to the Constitution; and the exhausting—before coming here with the application for leave to file a petition for the writ of *habeas corpus*—of every legal remedy available to petitioner. Both the *Chapman* and *Kollock* cases arose in the District of Columbia.

In this case petitioner was proceeded against in the Police Court by information filed on behalf of the District of Columbia. Contending that the statute under which it was sought to prosecute him was unconstitutional, he filed his motion to quash the information. The presiding judge of the Police Court granted that motion. The District of Columbia obtained from the Court of Appeals a writ of error. The Court of Appeals (one of the three justices dissenting) reversed the judgment of the trial court, held that the Act was constitutional, and that the facts included in an "Agreed Statement of Facts," which was by stipulation made part of the information, constituted a violation of the Act. Petitioner applied to this Court for a writ of certiorari to the Court of Appeals, for the purpose of here obtaining a review of that Court's decision. This Court denied that writ.

Petitioner then surrendered himself to the Police Court and pleaded not guilty to the charge against him. The case was submitted to the Court upon the Agreed Statement of Facts above mentioned. (Said Statement of Facts is annexed to the petition herein as part of "Exhibit A" thereto.) Petitioner was adjudged guilty and sentenced to pay a fine of $100 or in default thereof be committed to

the common jail of the District for a period of five months. Failing to pay the fine imposed, he was taken into custody. He now applies to this Court for leave to file a petition for the writ of *habeas corpus*, alleging that he is unlawfully deprived of his liberty in that the statute under which he was prosecuted, and on which the proceeding against him was based, is in violation of the Constitution of the United States.

It will be observed that the petitioner has exhausted every legal remedy available to him and that he will stand unlawfully deprived of his liberty unless this Court releases him under the writ of *habeas corpus*.

In addition to the *Kollock* and *Chapman* cases, *supra*, this Court on applications made directly to it has either issued the writ of *habeas corpus*, or decided on the application for the writ the questions raised by the petitions therefor, in numerous cases, a few of which are:

Ex parte Wilson, 11 U. S., 417.
Ex parte Roland, 104 U. S., 604.
Ex parte Curtis, 106 U. S., 375.
Ex parte Yarbrough, 110 U. S., 651.
Ex parte Fiske, 113 U. S., 713.
In re Ayres, 123 U. S., 443.
In re Sawyer, 124 U. S., 200.
In re Medley, 134 U. S., 160.
In re Neagle, 135 U. S., 1.
In re Burrus, 136 U. S., 586.
In re Mayfield, 141 U. S., 107.
In re Watts and Sachs, 190 U. S., 1, 35.
In re Hoff, 197 U. S., 488.
In re Lincoln, 202 U. S., 178.

In *Ex parte Hoff*, 197 U. S., 488, as the Circuit Court of Appeals had in another case decided the exact question at issue, petitioner presented his application for *habeas corpus* direct to this Court, leave to file the petition was given, the writ issued and the petitioner discharged. In the instant

case, the Court of Appeals has decided the contentions of the petitioner adversely to him in this very case.

In several of the foregoing cases, the petitioners were discharged; in others, it was held by the Court that the statutes under which the indictments complained of were found were constitutional, and that, therefore, the petitioners were not entitled to discharge, regardless of the other objections raised, as they did not go to the jurisdiction of the Courts.

When this case was presented to this Court, at this term, on petition for certiorari, no final judgment had been rendered below against the petitioner. His counsel apprehend that possibly the writ of certiorari was denied because of this fact. The completed record now shows a final judgment and a taking in custody thereunder. Copies of all of the proceedings, including the judgment of the Police Court and the Commitment thereunder, will be found as exhibits to the petition, leave to file which is hereby sought. The opinion of the Court of Appeals against petitioner is appended as "Exhibit D" to the petition.

The Court of Appeals having decided this very case and the writ of certiorari from this Court to the Court of Appeals having been denied, the petitioner is without remedy other than this proceeding to obtain his release from restraint under a void judgment based upon an unconstitutional statute.

(b) THE GROUND ON WHICH PETITION FOR THE WRIT IS BASED:

The petitioner is deprived of his liberty unlawfully in that the law under which he is convicted is in violation of the Constitution of the United States.

The Legislative Assembly of the District of Columbia, by an Act approved August 23, 1871 [Acts, Legislative

Assembly, D. C., Part 2, pp. 87, 96], provided for the issuance of licenses to "gift enterprises" and defined that term as follows:

> "Every person who shall sell or offer for sale any article * * * of merchandise of any description whatever * * * with a promise, express or implied, to give or bestow, * * * any article or thing, for and in consideration of the purchase by any person of any other article or thing, * * * shall be regarded as a gift enterprise."

The Act of Congress of February 17, 1873 [now Sections 1176-1177, R. S., D. C.], enacted that thereafter it should be unlawful "for any person or persons to engage in said business in any manner as defined in said Act" of the Legislative Assembly as above quoted, and Congress provided that every person who shall engage in a gift enterprise as thus defined shall "on conviction thereof in the Police Court, on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars, or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the Court."

This Act has been held by the Court of Appeals of the District of Columbia to be a constitutional exercise of the police power of Congress over said District. And yet the same Court, following the repeated decisions of this Court, has held that the exercise of the police power of the legislature must always in some way pertain to matters "affecting the public health, safety, peace, and morals" of the community. *Lansburg vs. D. C.*, 11 App. D. C., 512; *Lawton vs. Steele*, 152 U. S.

The trial Court was absolutely without jurisdiction because the entire statute under which the prosecution was

carried on is unconstitutional, and that unconstitutional statute in terms attempts to confer jurisdiction on the District branch of the Police Court "on information filed on behalf of the District of Columbia" for acts denounced as offenses by it and to prescribe punishment for the violation of it.

> "Nor [shall any person] be deprived of life, liberty, or property, without due process of law." (Amendment 5, U. S. Constitution.)

All the guarantees of the Constitution respecting life, liberty, and property are equally for the benefit and protection of all citizens of the United States residing permanently or temporarily within the District of Columbia, as of those residing in the several States. *Callan vs. Wilson,* 127 U. S., 540.

The 5th Amendment is a restraint on the *legislative* as well as on the executive and judicial powers of the Government. *Murray vs. Hoboken Land Company,* 18 How., 277.

It was long ago held that this amendment is not a limitation of the powers of the States, but a similar clause, as an inhibition on the States, is contained in the 14th Amendment. And the Court of Appeals said in the case of *Lansburg vs. District of Columbia,* 11 App. D. C., 521, a case under the very statute here involved, that—

> "the power of Congress to legislate in respect to matters affecting the public health, safety, peace and morals within the District of Columbia, is the same as that of the State legislatures within their several jurisdictions. It is neither greater nor less."

The police power of the legislature is an undefined and undefinable thing; but this Court and all Courts agree that the exercise of the police power must in some way "relate

to the safety, health, morals, and general welfare of the public." *Lochner vs. New York*, 198 U. S., 53.

So, too, it has been held with respect to this exercise of the police power that—

> "Whilst much is left to the discretion of the legislature and its exercise thereof will not be lightly disturbed, yet the final question whether the trade or calling is of such a nature as to justify police regulation, and when conceded to be such the length to which such legislation may be rightfully extended, is unquestionably to be finally determined by the Courts." *Lansburg vs. District of Columbia*, 11 App. D. C., 523; *Kerr vs. Ross*, 5 App. D. C., 249.

In the *Lappin case*, 22 App D. C., 77, the Court said:

> "The undoubted right to pursue any legitimate trade, calling, or profession, subject only to such reasonable regulations in the interest of the public welfare as may be imposed upon all persons under like conditions, may in many respects, be considered as a distinguishing feature of our republican institutions."

And in this petitioner's case the Court of Appeals said:

> "The Police Power in the District of Columbia, *upon the exercise of which this statute rests*, is substantially the same under the 5th Amendment, as that which may be exercised by the States under the limitations of the 14th Amendment."

In Allgeyer vs. Louisiana, 165 U. S., 589, 590, this Court said:

> *"The statute which forbids such act does not become due process of law, because it is inconsistent with the provisions of the Constitution of the Union. The principle mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of person, as by incarceration, but the*

term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned.

"It was said by Mr. Justice Bradley, in *Butchers' Union Company vs. Crescent City Company*, 111 U. S., 746, 762, in the course of his concurring opinion in that case, that 'The right to follow any of the common occupations of life is an inalienable right. It was formulated as such under the phrase "pursuit of happiness" in the Declaration of Independence, which commenced with the fundamental proposition that "all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." This right is a large ingredient in the civil liberty of the citizen.' Again, on page 764, the learned Justice said: 'I hold that the liberty of pursuit—the right to follow any of the ordinary callings of life—is one of the privileges of a citizen of the United States.' And again, on page 765: 'But if it does not abridge the privileges and immunities of a citizen of the United States to prohibit him from pursuing his chosen calling, and giving to others the exclusive right of pursuing it, it certainly does deprive him (to a certain extent) of his liberty; for it takes from him the freedom of adopting and following the pursuit which he prefers; which, as already intimated, is a material part of the liberty of the citizen.' It is true that these remarks were made in regard to questions of monopoly, but they well describe the rights which are covered by the word 'liberty,' as contained in the Fourteenth Amendment."

In *Williams vs. Fears*, 179 U. S., 270, 274, the Court reiterated the doctrine that the liberty, of which the depri-

vation without due process of law is forbidden, includes the right to enter into all contracts which may be proper in any lawful calling or business.

And in the case of *Lochner vs. New York*, 198 U. S., 45, it was held that an Act of the New York Legislature, limiting the hours of employment in bakeries, could not be sustained as a valid exercise of the police power to protect the public health, safety, morals, or general welfare. In that case, the Court reaffirmed its earlier doctrine, that a conviction under an unconstitutional statute was a deprivation of liberty "without due process of law," as that term is used in the Federal Constitution. The Court said:

> "The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment of the Federal Constitution. Allgeyer vs. Louisiana, 165 U. S., 578. Under that provision, no State can deprive any person of life, liberty or property without due process of law." (198 U. S., 53.)

The limitation on the power of the State Legislatures in the above cases is contained in the 14th Amendment. The limitation on the power of Congress as the legislative body of the District of Columbia, in the same language, is contained in the 5th Amendment.

In petitioner's case, the Statute involved, in terms, makes it unlawful for a merchant to accompany the sale of a lawful article by the gift of another lawful article as an inducement to the sale. Clearly, this is an unwarranted interference with the freedom of contract. It was long ago held that the phrase "due process of law," as used in the 5th Amendment to the Constitution of the United States, means the law of the land: *Murray vs. Hoboken Land and Improvement Company*, 18 How., 372; and that that phrase is an equivalent of the phrase, "the law of the land," in

Magna Charta: *Davidson vs. New Orleans*, 96 U. S., 97; and that the provision of Magna Charta that no man ought to be deprived of his life, liberty or property, but by the law of the land was intended to secure the individual from the arbitrary exercise of the powers of Government: *Bank of Columbia vs. Okely*, 4 Wheat., 235.

With these great principles before us, let us return to a consideration of the Statute here invoked by the District authorities. It is contended by the District that the language of the Statute in question is so broad that it cannot be restricted in its application to immoral undertakings, or "gift enterprises" properly so called. This is the very thing that establishes its unconstitutionality. In *Long vs. State*, 74 Md., 565, a similar statute was held unconstitutional because by its terms it comprehended gift enterprises containing the element of chance as well as those which did not contain any such element.

In the Statute under which petitioner has been prosecuted, Congress, by a reference to an enactment of the Legislative Assembly, declared that any one engaging in the business which that Legislative Assembly had licensed as lawful would thereafter be held to be doing an unlawful act. The purpose of the Legislative Assembly was to include everything that might possibly go by the name of "gift enterprise," in order to exact the license fee therefrom and enhance the revenues of the District of Columbia. The purpose of Congress in enacting Sections 1176-77 must have been to protect the morals of the community, but that body failed to limit this statutory inhibition to business plans which in any way affected public morals.

With the single exception of the District Court of Appeals, all the courts of last resort of this country, that have passed upon laws which sought to prohibit the carrying on of a business similar to that conducted by the peti-

tioner, have held State statutes identical in principle with the Act of Congress here in question, and some of which are in almost the exact language of said Act, to be unconstitutional and void because such statutes deprive those whom they affect of their liberty or property without due process of law. Such were the decisions in the following cases:

R. I.—*State vs. Dalton*, 22 R. I., 77.
Vt.—*State vs. Dodge*, 76 Vt., 197.
N. H.—*State vs. Ramseyer*, 73 N. H., 31.
N. Y.—*State vs. Gilson*, 109 N. Y., 389.
N. Y.—*People vs. Dycker*, 72 App. Div. (N. Y.), 309.
N. Y.—*People vs. Zimmerman*, 102 App. Div. (N. Y.), 103.
Mass.—*O'Keefe vs. Somerville*, 190 Mass., 110.
Va.—*Young vs. Commonwealth*, 101 Va., 853.
Wash.—*Leonard vs. Bassindale*, 46 Wash., 301.
Col.—*Denver vs. Frueauff*, 39 Col., 20.
Md.—*Long vs. State*, 75 Md., 565.
Cal.—*Ex parte McKenna*, 126 Cal., 429.
Cal.—*Ex parte Drexel and Holland*, 147 Cal., 763.
Ky.—*Commonwealth vs. Gibson Co.*, 125 Ky., 440.
Ala.—*State vs. Shugart*, 138 Ala., 86.
Ala.—*City of Montgomery vs. Kelly*, 142 Ala., 552.
N. C.—*Winston vs. Beeson*, 135 N. C., 271.
La.—*State vs. Walker*, 105 La., 492.
Minn.—*State vs. Sperry*, 126 N. W. Rep., 120.

In *Commonwealth vs. Sisson*, 178 Mass., 578, and *Commonwealth vs. Emerson*, 156 Mass., 146, the Court held that the statutes involved could and would be limited by construction to cover only transactions containing elements of chance. It is clear from these decisions that the view of the Court was that it would be unconstitutional for an act to attempt to prohibit as an offense the making of gifts as an inducement for trade in a manner which did not in-

volve any element of chance whatever. Both by its terms and as construed by the Court of Appeals of the District of Columbia, the Statute in question here prohibits transactions which do not in the least, and which the Court below conceded do not, involve any element of chance or appeal to the gambling instinct.

In the following Federal cases the courts held unconstitutional acts prohibiting or attempting to tax out of existence the premium advertising, or trading stamp, business:

Ex parte Hutchinson, 137 Fed., 949, Circuit Court, District of Washington.

Ex parte Hutchinson, 137 Fed., 950, Circuit Court, District of Oregon.

Humes vs. City of Little Rock, 138 Fed. Rep., 929, Circuit Court, W. D. Ark.

In the case of *Sperry and Hutchinson Company vs. Temple,* Circuit Court of Massachusetts, 137 Fed. Rep., 993, Circuit Judge Putnam said:

> "The trading stamp business is essentially legitimate, and so far as the Court can discover it is the only way in which the small purchaser practically obtains a discount for immediate payment. * * * So far as this case is concerned, the Court is unable to perceive from any proof in the record, or from any suggestion, that the business of the complainant is not perfectly legitimate * * * *which the legislature has no right to obstruct.*"

The case of *State vs. Dodge,* 76 Vt., 197 (a trading-stamp case) was decided in 1904. It was heard before Rowell, C. J., Tyler, Munson, Start, Watson and Stafford, JJ. This case is typical of all the State cases cited. The Vermont statute read:

> "Section 1. No person or company shall in the sale, exchange or disposition of any property, give or deliver

in connection therewith, or in consideration of said sale, exchange or disposition, any stamp, coupon or other device, which entitled the purchaser or receiver of said property or any other person to demand or receive from any person or company, other than the person making said sale, exchange or disposition, any other property than that actually sold or exchanged; and no person or company, other than the person so selling, or disposing of the property shall deliver any goods, wares or merchandise upon the presentation of such stamp, coupon, or other device.

"Section 2. Any person or company who violates any provision of the foregoing section shall for each offense be punished by fine * * *."

The Court held this statute unconstitutional. In the course of the opinion by Start, J., it is said (p. 201):

"A person living under the Federal Constitution is at liberty to adopt and follow such lawful industrial pursuits as he sees fit and has a right to the full exercise and enjoyment of his faculties in a lawful pursuit and calling, in a proper manner, subject to only such restraints as are necessary for the common welfare. When it is claimed that an act of the legislature infringes upon such liberty or right, and the consideration of the act is properly before the Court, it is the duty of the Court to declare the act invalid, if it infringes upon such liberty or right; and this is so whether the act purports to be an exercise of the police power of the legislature, or of its general governmental power to regulate business affected with a public interest. *Lawton vs. Steele*, 152 U. S., 133; *Allgeyer vs. Louisiana*, 165 U. S., 578. The business which the act prohibits is not of a public nature. Property, the transfer of which is prohibited, is not affected with a public interest. The merchant who, by the act, is subject to a penalty if he delivers stamps or coupons contrary to its provisions, is under no duty to serve the public; nor to sell his wares to any one; and it

cannot be said that the enactment is a proper exercise of the general governmental power of the legislature to regulate business that is affected with a public interest, nor is it claimed by the counsel for the State that the prohibited business in any way affects the public health or safety."

"The act itself does not show that the purpose of its enactment was to prohibit transactions having an element of chance; on the contrary * * * it prohibits the seller of property from giving a stamp or coupon which entitled the purchaser to demand and receive property from a third party, and the delivery of goods, wares, and merchandise upon such stamps and coupons. There is no 'element of chance.'

"The act makes it lawful for the merchant to give a stamp, redeemable by himself in cash or merchandise, and by a third party in cash, and makes it unlawful for him, under like circumstances and conditions, to give the purchaser a trading stamp which is redeemable in some well-defined article by another merchant. This is equivalent to declaring that a man shall not give an article as an inducement to a buyer to purchase another article, for it can make no possible difference that the article given with the sale is delivered to the purchaser by a third person instead of the seller himself. * * * If the giving and redeeming of stamps, coupons or other devices is so conducted as to be in fact a lottery, or chance scheme, the offense is punishable under" another statute of the State; "but, as we have seen, the plan does not show that the respondent conducted a business having elements of chance."

"It is further insisted by the counsel for the State that the scheme made out is demoralizing to legitimate business; but we see nothing in the prohibited business that can be thus criticised. It does not differ from the ordinary business, except in the method of advertising, and in lawful trade inducements. It is true that this

method of doing business may enable a trader to do more business than he otherwise would, who does not choose to incur the expenses incident to this method of advertising and increasing his business; but this furnishes no reason for prohibiting the business. * * *."

"It is not attempted by the act to *regulate* the giving of stamps or coupons redeemable in goods, wares and merchandise, by the person other than the giver of the stamp or coupon, but it *absolutely prohibits* such transactions. It prohibits the carrying on of a branch of business or trade that is not affected with a public interest, and has no relation to the public health, morals or safety, and embraces an arbitrary and unnecessary restraint upon lawful business transactions, and within the meaning of the Fourteenth Amendment to the Constitution of the United States, is an unlawful restraint upon the liberty of a person to make such contracts, not inconsistent with the lawful rights of others, as he judges for his best interests, and upon his use of his business capacities for a lawful purpose, and falls within the constitutional prohibition, and is not a lawful exercise of the police power of the legislature."

We have quoted thus fully from *State vs. Dodge* because an examination of all the cases cited will show that the State courts of last resort have rendered decisions similar to, and in principle identical with, this decision of the Supreme Court of Vermont.

In *State vs. Ramseyer*, 73 N. H., 40, the Court, in a case similar to the one before this Court, said:

"The legislative prohibition of a business not harmful to society in any of its essential features, though comparatively novel and peculiar, cannot receive judicial sanction merely because the prohibited business stimulates competition among merchants in disposing of their wares, or affords an unusual method of commercial advertising."

In *Denver vs. Frueauff*, 39 Col., 20, the Court, in holding the statute under consideration unconstitutional, said:

> "Such definitions [of gift enterprises] are subject to review by the Courts as to whether or not when making the same the legislative body has acted within its power and prerogatives as limited by the Constitution. The test of the limit is to be found in the definition of the police power which may be exercised by legislative bodies regulating the conduct of business of others. They can only do so where the business regulated interferes with public health, public morality, or safety. It cannot be for a moment contended in this case that the business interferes with any of these things unless it be with the public morality, and it would only interfere with the public morality in case it can be successfully shown that the business involves those elements of chance involved in lotteries and gambling."

> "* * * it is equally clear that the city council cannot, by arbitrarily defining the business of the trading stamp company as such, bring it within the class of inhibited enterprises, and under the guise of the exercise of its police power prohibit the carrying on of that which we have seen is a legitimate business."

In *Winston vs. Beeson*, 135 N. C., 271, text 283, the Court, referring to the trading-stamp business, said:

> "The plan, as outlined in the verdict, seems to be one for advertising the merchant's business and his wares and enabling him to sell his goods for cash instead of on time. This it must be conceded is an advantage to him. It is also a benefit to the customer, who practically receives a discount and who will buy more cautiously and judiciously if he pays cash, and will spend only according to his means."

In *City of Montgomery vs. Kelly*, 142 Ala., 552, at page 556, the Court, speaking of this class of business, said:

> "The character of the business shows it to be one of the legitimate and useful lines of trade, which neither the State nor the municipality can subject to police regulations, with any color of reason."

Peculiarly applicable to an actual cash discount plan, such as that of the plan of business conducted by petitioner, is the following from the California Court's opinion in *ex parte Drexel-Holland*, 147 Cal., 763, 773:

> "Indeed, an ordinary trading stamp, or coupon, is in substance a mere form of allowing discounts on cash payments, and its issuance is entirely harmless and within the constitutional right of contract. It may be distasteful to certain competitors in business; but the latter should remember that if a statute suppressing it be upheld, then other oppressive statutes might be enacted unlawfully interfering with and hampering business and the right of contract to which those competitors would strenuously but vainly object."

In *State vs. Dalton*, 22 R. I., 77, the Court said:

> "The thing sought to be accomplished by the vendor is the sale of his goods by means of the inducement held out to the purchaser in the form of a premium, and if he may himself give and deliver the premium, as he clearly may, he may also give it through a third party. * * * We think it is clear that such a prohibition is an unwarranted interference with the individual liberty which is guaranteed to every citizen, both by our State constitution and also by the Fourteenth Amendment of the Constitution of the United States."

In *People vs. Gillson*, 109 N. Y., 389, the Court held unconstitutional a statute identical in principle with that here involved. In Gillson's case, the opinion of the late Justice Peckham, then Chief Judge of the New York Court of Appeals, luminously and exhaustively discussed the con-

stitutional limitations on legislative bodies in cases of this kind.

Authorities might be multiplied; the limit of the number would simply represent the limit of the number of the Courts which have passed upon this question. The element of chance—the gambling or lottery idea—eliminated, no Court, other than the District Court of Appeals, has held such a plan as that presented in the record of petitioner's case to be unlawful; no other Court has upheld as a valid exercise of the police power any statute or ordinance attempting to denounce as unlawful the carrying on of such a business as that which the record in this case shows that the petitioner is carrying on.

No Court, except the District of Columbia Court of Appeals, has ever upheld as constitutional any legislative attempt to make unlawful the giving of a lawful article as an inducement to the sale of another lawful article. In other words, the "trading stamp business," as carried on by petitioner, has been recognized as lawful all over the land, and every legislative attempt to declare it unlawful, save only that involved in such attempt in this District, has been denounced by the Courts of last resort as unconstitutional. This question has been before Courts of last resort repeatedly, and always with the same result. The statute on which the prosecution of the petitioner is based does not simply prohibit transactions involving the element of chance, or appeals to the gambling instinct. Neither in its terms, nor as it has been construed by the Court of Appeals of the District, is it limited to that class of transactions.

In their brief filed in this Court, in case No. 588, October Term, 1910, opposing petition for the writ of certiorari, counsel for the District of Columbia say that the constitutionality of the statute is not involved in this case. This

statement is clearly erroneous, as is shown by the majority opinion of the Court of Appeals, printed as Exhibit D to the petition herein, wherein the Court of Appeals say of the questions involved in this very case that:

> "A vigorous attack has been made on the act as unconstitutional because it is an unreasonable interference with the freedom of trade and contract."

The burden of the majority opinion is an attempt to show that this statute is constitutional, its validity being the very question "vigorously" pressed upon the Court of Appeals. A number of cases from this Court, respecting the constitutionality of laws assailed because they were alleged to unduly restrict the freedom of contract, are cited in the opinion of the Court of Appeals. After a lengthy discussion of the question of the constitutionality of the statute, that opinion concludes with the remark that the principle involved is most important, that the conflict of authority respecting it is great, and that the "vexed question" can alone be settled by the Supreme Court of the United States. Certainly, therefore, there is no foundation whatever for the statement that the constitutionality of the act is not involved in this case.

Again referring to the brief filed by the District of Columbia in case No. 588, opposing the petition for certiorari, we regret to find there that the learned counsel for the District disingenuously state that this statute simply prohibits "a class of lottery which has been prohibited in a large majority of the States." It is indisputable that the very business carried on in this District by petitioner, as manager for the Sperry and Hutchinson Company, is conducted by petitioner's said company, and permitted by law to be conducted, in *every State of the Union*. It is indisputable that every attempt of State legislatures to

prohibit the petitioner's business as unlawful has failed. It is equally indisputable that the Court of Appeals nowhere holds that there is any element of chance or lottery in the plan of business of the petitioner. If the statute in question simply prohibited "a class of lottery which has been prohibited in a large majority of the States," then concededly the prosecution of this petitioner could not have been upheld by the District Court of Appeals. The Court of Appeals planted its decision in this case squarely on matters containing nothing whatever in the way of an element of chance, and as to which it was not even suggested that an element of chance was involved. The majority of the Court of Appeals points out distinctly, and specifically, and exclusively as *the thing* which makes this business unlawful, the fact that it constitutes the intervention of a middleman between the "merchant on the one hand and his customer on the other." It is the doctrine of the District Court of Appeals that a merchant himself may accompany the sale of a lawful article by a gift of something specific and certain, not attended by any element of chance, and that Congress could not constitutionally make such a transaction unlawful. In petitioner's case, the transaction is held unlawful, however, because the discount or merchandise is not given directly "by the merchant himself to a customer!" Under this decision, that which is lawful when done by the merchant through another!

The Court points out that the trading stamp method of advertising necessarily costs the merchant something, and assumes that such cost would be added to the price of the merchandise sold, thereby ultimately falling on the consumer. And it holds that Congress can constitutionally interdict this. The Court, in its opinion, says that the argument is pressed that "the trading stamp companies are engaged in advertising the merchants contracting with them; and it

is contended that this business, in that respect, is similar to that of the ordinary newspaper." The Court concedes that the merchant must purchase such space as he uses for advertising in the newspapers, and that (in the language of the majority opinion), "undoubtedly the cost of this advertising is an expense that must be added to the cost of carrying on the business, and borne with other incidental expenses. No way can be devised by which the cost of transportation and the legitimate handling of produce or goods in the transfer from purchaser to consumer can be eliminated." But the reason given in that opinion why the fact that advertising through the medium of trading stamp companies is subject to constitutional statutory prohibition, whereas advertising through the medium of newspapers could not be subjected to such prohibition, is simply that "the newspaper is a time honored institution indispensable to civilized society," and in addition to opening its page to advertisers, it gives the current news. The majority opinion of the Court of Appeals will be read in vain to find any other ground for holding that the Statute here involved is a constitutional exercise of the police power, and that the facts shown by the petitioner's case are unlawful and properly prohibited.

II.

ON MOTION TO ADMIT TO BAIL.

In the case of *In re Chapman*, 166 U. S., 661, on January 4, 1897, this Court admitted the petitioner to bail.

In the case of *In re Kollock*, 165 U. S., 526, an order admitting the petitioner to bail was passed immediately after the application for leave to file the petition was filed.

In both these cases, the writ was subsequently denied, but, by order of this Court, the petitioners were at large

under bail until the disposal of their cases by this Court.

In the case of *In re Watts and Sachs,* 190 U. S., 1, the petitioners were, by order of this Court, admitted to bail in the trial Court.

In *In re Ayres,* 123 U. S., 443, the Court enlarged the petitioners on bail.

We submit that this petitioner should be admitted to bail and not restrained of his liberty pending the determination of the important constitutional question raised by his petition.

CONCLUSION.

We submit the foregoing as an imperfect presentation of the argument in favor of the proposition that the Act of Congress involved is void. We assume that the respondent will be called upon to answer this petition, and that if the respondent controverts our claim the case will be set down for hearing in the regular way. In that event we shall submit an additional brief more fully presenting the views taken by the numerous courts which have had before them the question now to be submitted to this Court.

A. S. WORTHINGTON,
FRANK J. HOGAN,
Attorneys for Petitioner.

JOHN HALL JONES,
Of Counsel.

WASHINGTON, November 7, 1910.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Original, No. 17.

IN RE WALTER J. GREGORY, PETITIONER.

MEMORANDUM ON BEHALF OF PETITIONER IN REPLY TO BRIEF FILED BY "CORPORATION COUNSEL" OPPOSING APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

A. S. WORTHINGTON,
FRANK J. HOGAN,
Attorneys for Petitioner.

JOHN HALL JONES,
Of Counsel.

IN THE

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MEMORANDUM ON BEHALF OF PETITIONER IN REPLY TO BRIEF FILED BY "CORPORATION COUNSEL" OPPOSING APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

This case is before the court now only on the application for leave to file a petition for the writ of *habeas corpus*. It is not yet on the docket of the court and therefore has no number. If the court shall allow the petition to be filed and the usual course is followed, a rule will issue to the respondent, Thomas H. McKee, warden of the jail of this District, to show cause why the writ shall not be issued as prayed. Upon a return to this rule being made by the warden, the case will then be before the court for consideration of the merits.

This was the course pursued in *Ex parte* Watkins, 7th Peters, 568; in *Ex parte* Yarborough, 110 U. S., 651; in Chapman's case, 166 U. S., 661; in *Ex parte* Baez, 177 U. S., 378; in Kollock's case, 165 U. S., 526, and in many other cases in this court. In the case of Baez it is stated in the beginning of the opinion, referring to the application for leave to file the petition, that "leave was granted according to the usual custom."

In such cases the petition is filed, the rule to show cause is issued and served on the respondent, a return to the rule is made, and the case is then set down for argument. The court is not called upon to decide whether the writ shall issue until both parties have had an opportunity to file briefs addressed to the merits and the court has had the advantage of hearing oral argument.

It does not yet appear what are the facts in this case. To the application filed by the petitioner there are appended certain exhibits which purport to show the proceedings in the case in the police court which have resulted in the petitioner's being deprived of his liberty. The warden of the jail has as yet had no opportunity to inform the court whether the record in the case is in this way correctly and fully set forth.

It is not controverted by the undersigned that a case of this kind may be disposed of upon the application for leave to file a petition for the writ of *habeas corpus*, but it is submitted that that course is pursued only when it is manifest from the application itself that the case is without merit.

In this case two of the four judges who passed upon the questions involved held that the act of Congress invoked does not apply at all to the case made by the agreed statement of facts upon which the case was submitted to the court. No one pretends that that statement of facts shows a

criminal act unless the business which the petitioner is engaged in is made a crime by some act of Congress. Nobody pretends that there is any act of Congress which covers the case unless it be the act the constitutionality of which is questioned by the petitioner. If those two judges, therefore, are right in their construction of the act of Congress, the police court was clearly without jurisdiction.

As to the views of the two members of the Court of Appeals of the District who concurred in the prevailing opinion in the Kraft case (which governed Gregory's case in that court), enough has been said in our original brief here to show not only that there is here involved a real and serious question of constitutional law, but that that opinion is at war with the deliberate judgment of a great number of the courts of last resort in the States of this Union and with a number of decisions of inferior Federal courts.

We restate here in simpler form what this case is:

The petitioner sold certain printed tokens to merchants, agreeing to redeem them in cash or in merchandise at his store. The merchants sold these tokens to their cash customers, with the understanding between the merchant and the customer that they would be so redeemed by the petitioner.

Now, we submit that if Congress, by the statute in question, intended to make persons engaging in such a simple and ordinary business transaction guilty of a criminal offense, the statute is void, because it authorizes the deprivation of liberty without due process of law. This position is maintained under many decisions of this court, some of which are referred to in our first brief. The two judges of the Court of Appeals who concurred in the prevailing opinion in the Court of Appeals in the Kraft case distinctly held that the statute does cover the business above described, and that Congress has the power to prohibit such business.

The Court of Appeals agrees with the numerous other courts which have considered the question that in this trading-stamp business so called there is no element of chance. The decision adverse to Kraft (and to Gregory) is placed solely and squarely on the ground that full-grown American citizens engaged in selling merchandise may be prevented by law from bringing cash customers to their stores by the means set out in this record on the theory that they are being "forced" to adopt such means!

The importance of this case is manifest from the consideration that the question involved applies not only to the powers of the Congress of the United States, but to the powers of the legislature of every State in the Union. The Fifth Amendment, which we invoke, prohibits the Congress of the United States from depriving any person of life, liberty, or property without due process of law. The Fourteenth Amendment, in the same language, applies a like prohibition to the States. If Congress may do here in this District what the Court of Appeals has held in this case it may do, the legislature of every State in the Union has the same power.

That an application to this court in the first instance for a writ of *habeas corpus* on behalf of one imprisoned pursuant to the action of an inferior court in a case where it is without jurisdiction or exceeded its powers, or proceeded under an unconstitutional legislative act, will be entertained by this court as part of its appellate jurisdiction has clearly and distinctly been held on numerous occasions by this court, some of the leading cases in which this precise question is considered being *Ex parte* Bollman and Swartwout, 4th Cranch, 75; *Ex parte* Yerger, 8th Wallace, 85; *Ex parte* Virginia, 100 U. S., 339, and *Ex parte* Siebold, 100 U. S., 371.

The cases in this court cited in the brief of the corporation counsel to the point that the writ of *habeas corpus* cannot be made to do duty as a writ of error have no pertinence here. We are not asking the court to weigh any evidence. The facts are admitted. There are only two possible questions in the case, and they are both questions of law. The first is whether Congress has undertaken to prohibit what the petitioner admits that he did. If Congress did not so intend, then it is conceded on all hands that the court below was without jurisdiction, because what the petitioner admits that he did was not made a penal offense either by the common law or by any act of Congress. If Congress did so intend, then the remaining question is whether Congress has the power to prohibit such a business transaction as is here involved. If it did not, then the police court was without jurisdiction, because a void act cannot confer jurisdiction on any court.

The Court of Appeals has decided that the police court did have jurisdiction. Counsel for the District of Columbia seemed to contend that if an inferior court of the United States decides that it has jurisdiction, then this court cannot intervene, because the lower court had jurisdiction to decide whether it had jurisdiction. If this be the law, then practically every one of the numerous cases in which this court, on application here for a writ of *habeas corpus*, has considered and determined whether the inferior court had jurisdiction, should have been dismissed without consideration: and the great power which this court, in the cases above referred to, has maintained that it holds and will exercise to set at liberty those who have been imprisoned by inferior courts without authority of law will be rendered nugatory. No inferior court of the United States has yet decided that it would imprison a citizen whether it had jurisdiction to do so or not, and it is not probable that any such court will ever render such a decision.

The only case cited in this connection by the corporation counsel which has any bearing at all is Bigelow's case, 113 U. S., 330. That this court in a *habeas corpus* proceeding is not bound by the decision of the inferior court on a question of former jeopardy was expressly held in *Ex parte* Lange, 18 Wall., 168; in Snow's case, 120 U. S., 274, and in Neilsen's case, 131 U. S., 176.

It is submitted that the leave asked should be given; that a rule to show cause why the writ of *habeas corpus* shall not be issued should be served on the warden, and that upon the filing of his return the case should be set down for hearing at such time as the court may designate.

A. S. Worthington,
Frank J. Hogan,
Attorneys for Petitioner.

John Hall Jones,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Original No. 17.

IN RE WALTER J. GREGORY, PETITIONER.

BRIEF

In Support of Petition for Habeas Corpus.

JOHN HALL JONES,
New York City,
Attorney for Petitioner.

W. BURTON CRIBB,
JOHN HALL JONES,
Of Counsel.

The Jurisdiction of the Police Court.

In addition to the matters set forth in the return of the warden and in the statement of facts contained in this brief, reference is made to the following authorities on the subject of the jurisdiction of the police court:

In Ransdell *vs.* Patterson it was held that where the police court has jurisdiction of the offense charged and a conviction is authorized by statute, upon such conviction the committal to prison in default of the payment of the fine imposed is fully warranted by law and the writ of *habeas corpus* will not be granted.

Ransdell *vs.* Patterson, 1 App. D. C., 489, 498.

Speaking of the jurisdiction of the police court it was said in U. S. *vs.* Mills that—

> "It requires no elaboration of argument or citation of authorities to show that when there is mention either in the Constitution or in the statute law of the courts of the United States, the courts thereby meant are those of general jurisdiction and not temporary, transitional, or sporadic courts; or courts of inferior and limited jurisdiction, specially organized to deal in a summary way with petty matters, either civil or criminal, outside of the usual course and scope of the common law. Of the latter character, undoubtedly, is the police court of the District of Columbia, although some common-law jurisdiction has now been conferred upon it, and it has been authorized to proceed in divers cases in accordance with common-law methods. Like the courts of the justices of the peace, which it was intended in criminal matters to supersede, its purpose was to take the place of the county courts or other courts of minor jurisdiction in England, which were never regarded as being within the general judicial system of that country, and the successors of which for the District of Columbia were certainly never contemplated by the framers of the

Federal Constitution as coming within the scope of the provisions which they established for a Federal judicial system. The police court of the District of Columbia, therefore, although a court of the United States, is not a court of the United States in the sense of the Federal Constitution, and there is no reason for giving to the same expression in a statute a broader meaning than is given to it in the Constitution. In fact, when there is mention of the courts of the United States in any statute, we may conclusively assume that only the courts of general jurisdiction intended by the Constitution are meant, unless there is special reason to be deduced from the context of the statute for giving to the expression a different meaning."

U. S. *vs.* Mills, 11 App. D. C., 500, 506, 507.

While the police court is not one of the inferior courts of the United States whose decisions can be reviewed by virtue of the appellate jurisdiction of this court, yet nevertheless its judgments cannot be collaterally attacked in this or any other court where it proceeds within its jurisdiction. We understand that the sole ground for the attempted review of the decision of the police court in this case is the claim that that court did not have jurisdiction because the statute is unconstitutional. The return of the warden shows every step necessary to the exercise of jurisdiction by the police court; hence its judgment cannot be collaterally attacked.

"The judgment or condemnation in this case was shown by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction.

"If it were so, railroad companies would have no assurance that the steps taken by them to procure a right of way would conclude any way and they would be constantly subject to vexatious litigation."

Secomb *vs.* R. R., 23 Wall., 108, 119.

Jurisdiction of the Supreme Court of the United States.

1. The police court had jurisdiction of the person and offense, and this court will not review its decisions under *habeas corpus* for supposed error in its ruling—

(*a*) On the construction of the statute.

(*b*) As to the sufficiency of the information.

(*c*) As to the regularity of the proceedings.

(*d*) That the offense was punishable.

(*e*) As the weight or sufficiency of the evidence or upon any question of fact.

(*f*) As to whether the facts amount to an offense.

(*g*) Upon any question properly to be considered by that court.

(*h*) Or for any other purpose except to ascertain whether the act is constitutional, as to which affirmative proof is required, every presumption being in favor of its validity.

This court has declined to allow a writ of certiorari to review the judgment of the Court of Appeals for supposed error in the ruling of that court in reversing the judgment of the police court quashing the information filed in this case. A similar course was adopted in Sinclair *vs.* District of Columbia (194 U. S., 672), after this court had dismissed a writ of error to the Court of Appeals for want of appellate jurisdiction. In Sinclair *vs.* District of Columbia (192 U. S., 16) it was contended that the act of Congress approved February 2, 1899, entitled "An act for the prevention of smoke in the District of Columbia and for other purposes" (30 Stats., 812), was unconstitutional. Proceedings in said case had been commenced by information in the police court of the District of Columbia pursuant to the provisions of said act.

The case at bar is not one for the exercise of the original

or appellate jurisdiction of this court, and it is not here on error.

Wales *vs.* Whitney, 114 U. S., 564, 571.

This court is not called on to review the judgment of the Court of Appeals of the District of Columbia in this case.

Ex parte Siebold, 100 U. S., 371, 374, 375.

In Wales *vs.* Whitney the court said:

> "The writ of *habeas corpus* is not a writ of error, though in some cases in which the court issuing it *has* appellate power over the court by whose order the petitioner is held in custody, it may be used with a writ of certiorari for that purpose. In such case, however, as the one before us, it is not a writ of error."
>
> Wales *vs.* Whitney, 114 U. S., 564, 571.

In *Ex parte* Siebold the court, in a case where the petitioners had been indicted in a circuit court of the United States, said:

> "Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction, and may issue it in the exercise of appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law, except those in which it has original jurisdiction only."
>
> *Ex parte* Siebold, 100 U. S., 371, 374, 375.

In the latter case this court had appellate jurisdiction over the circuit court, although it had no appellate jurisdiction by writ of error over the judgment; but in the case at bar this court has no appellate jurisdiction, it is submitted, over the police court of the District of Columbia.

The Ground on Which the Petition is Based.

It has been decided that this court will not review on application for writ of *habeas corpus* the legality of an arrest for violation of a city ordinance under a warrant issued by the chief of police.

> "It has long been settled that originally this court cannot issue a writ of *habeas corpus* except under its appellate jurisdiction."
>
> *Ex parte* Hung Hang, 108 U. S., 552, 553.

It has also been held that petition for *habeas corpus* will be denied where the case was heard by a United States district judge at his chambers. The court said:

> "There is no form in which the appellate power can be exercised by this court over the proceeding of a district judge at his chambers. He exercises a special authority and the law has made no provision for the revision of his judgment. It cannot be brought before the District or Circuit Court; consequently it cannot in the nature of an appeal be brought before this court."
>
> The Matter of Metzger, 5 How., 176, 191.

The brief of counsel in support of the application for leave to file petition for *habeas corpus* states the following ground on which the petition for the writ is based:

> "The petitioner is deprived of his liberty unlawfully in that the law under which he is convicted is in violation of the Constitution of the United States" (Brief, bottom page 4).

We will assume that this court will inquire into the validity of the statute, whether constitutional or not, in order to ascertain whether the police court had jurisdiction of the *offense* charged in the information. We contend that such

examination will not extend into an examination into the sufficiency of the *information*.

Ex parte Kearney, 7 Wheat., 38, 43.
Ex parte Watkins, 3 Pet., 193, 203.
Ex parte Carll, 106 U. S., 521.
Ex parte Eckhart, 166 U. S., 481, 483.
Ex parte Parks, 93 U. S., 19.
Hyde *vs.* Shine, 199 U. S., 62.
U. S. *vs.* Pridgeon, 153 U. S., 48.

In *Ex parte* Kearney, petitioner was a witness in the Circuit Court for the District of Columbia and refused to answer a question as tending to incriminate him. He was adjudged in contempt and committed to jail. On motion for a *habeas corpus* this court said (page 43):

> "If this were an application for an *habeas corpus*, after judgment on an indictment for an offense within the jurisdiction of the Circuit Court, it could hardly be maintained that this court could revise such a judgment, or the proceedings which led to it, or set it aside, and discharge the prisoner. There is, in principle, no destinction between that case and the present."
>
> *Ex parte* Kearney, 7 Wheat., 38, 43.

In *Ex parte* Watkins, it was said:

> "But with what propriety can this court look into this indictment? We have no power to examine the proceedings on a writ of error, and it would be strange if, under color of a writ, to liberate the individual from unlawful imprisonment, we could substantially revise a judgment which the law has placed beyond our control and imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. * * * To determine whether an offense charged in an indictment be legally punish-

> able or not, is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction. Whether a judgment be for or against the prisoner the judgment is equally binding in the one case and in the other; and must remain in full force unless reversed regularly by a superior court capable of reversing it."
>
> *Ex parte* Watkins, 3 Pet., 193, 203.

In *Ex parte* Carll, one of the grounds for the application for the writ stated was that the instruments, described in the indictment and charged to have been forged, show on their face that they are not bonds or obligations of the United States, and, even if genuine, possess no validity. The court said:

> "In the indictment it is averred that the counterfeits were of bonds of the United States. This is enough for the purposes of the jurisdiction of the circuit court. Whether the bonds counterfeited are in the form of those actually issued by the Secretary of the Treasury under the authority of the act referred to, is a question of fact to be established on the trial. Errors committed on the trial of this issue do not deprive the court of its power to imprison upon conviction, and, as has been seen, such errors are not subject to correction here, either in the present form of proceeding or any other."
>
> *Ex parte* Carll, 106 U. S., 521, 522.

In *Ex parte* Parks, petitioner had been indicted under the bankruptcy law and charged with forging a receipt for costs, and he contended that the forging of this receipt was not made a crime by any act of Congress, and that as the courts of the United tates have no jurisdiction of common-law crimes, the district court had no jurisdiction to try him for the offense. The court said:

> "To the question whether it was or was not a crime within the statute was one which the district court

was competent to decide. It was before the court, and within its jurisdiction. No other court except the circuit court in the same district, having concurrent jurisdiction, is as competent to decide the question as the district court."

"Whether the act charged in the indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a question which has to be met at almost every stage of criminal proceedings; on motions to quash an indictment, and demurrers, on motions to arrest judgment, etc. The court may err, but it has jurisdiction of the question. If it errs, there is no remedy after final judgment, unless a writ of error lies to some superior court; and no such writ lies in this case. It would be an assumption of authority for this court, by means of the writ of *habeas corpus* to review every case in which the defendant attempts to controvert the criminality of the offense charged in the indictment."

Ex parte Parks, 93 U. S., 18, 20.

The act of Congress of February 15, 1888, made horse stealing in the Indian country an offense against the United States. On May 2, 1890, an act of Congress made the Nebraska Code the law for Oklahoma, within which Territory the previous act was thereby repealed. The jurisdiction of the district court for the first judicial district included parts of Oklahoma and the Cherokee Outlet. On November 12, 1890, horse stealing was no longer an offense in Oklahoma under the act of 1888, but in the Cherokee Outlet it was.

An indictment in said district court charged the commission of the offense of horse stealing on November 12, 1890, within the judicial district describing it so as to include part of Oklahoma and part of the Cherokee Outlet and averring the place of the offense to be "then and there Indian country and a place then and there under the sole and exclusive jurisdiction of the United States."

The court held that the indictment might be construed as charging an offense as having been committed in that part of the Outlet within the judicial district, and added:

> "But whether this be so or not, it is very clear that there is nothing on the face of the indictment to show affirmatively that the District Court for the First Judicial District, within and for Logan County, Oklahoma Territory, and for the Indian country attached thereto for judicial purposes, sitting with the powers of a District Court of the United States, did not have jurisdiction of the offense for which Pridgeon was convicted, so as to render its sentence void on collateral attack. If the indictment does not fairly and sufficiently aver that the offense in question was committed in the Cherokee Outlet, it certainly does not show affirmatively upon its face that it was committed elsewhere, and without the jurisdiction of the court. It may be, that upon demurrer or writ of error, the indictment might have been found defective in not alleging with greater certainty the particular locality in which the offense was committed, within the rule laid down in McBride *vs.* The State, 10 Humph. (Tenn.), 615, but it cannot be properly held that the indictment is so fatally defective on its face as to be open to collateral attack after trial and conviction, or that the sentence of the court pronounced thereon was void. The *habeas corpus* proceeding being a collateral attack of a civil nature, it must clearly and affirmatively appear that the indictment charged an offense of which the court had no jurisdiction, so that its sentence was void. This does not appear in the present case, and the second question certified must, therefore, be answered in the negative."
>
> U. S. *vs.* Pridgeon, 153 U. S., 48.

After reviewing the case of *In re* Coy, 127 U. S., 731, 757, and citing *Ex parte* Lange, 18 Wall., 163, and many State cases, the court also said:

> "Under a writ of *habeas corpus* the inquiry is addressed not to errors, but to the question whether the

proceedings and the judgment rendered therein are, for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence under which the petitioner is confined is void, he is not entitled to his discharge."

U. S. *vs.* Pridgeon, 153 U. S., 48.

In re Eckhart there was a conviction for murder in a State court which failed to specify the degree of murder, when the law divided it into degrees, the punishment varying according to the degrees. The judgment was erroneous, but it was held that the court had jurisdiction of the offense and the judgment was not a nullity. The court said:

"The case is analogous in principle to that of a trial and a conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offense against the statute claimed to have been violated. In this class of cases it has been held that a trial court possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on *habeas corpus* because of a lack of certainty or other defect in the statement in the indictment of the facts averred to constitute a crime."

Citing *In re* Eckhart, 166 U. S., 481, 483; *Ex parte* Coy, 127 U. S., 731; *Ex parte* Belt, 159 U. S., 95; *Ex parte* Bigelow, 113 U. S., 328.

In Hyde *vs.* Shine objections were made to the legal sufficiency of the indictment. The opinion of the court in reply thereto was as follows:

"It is sufficient to say of these objections that they are proper to be considered by the trial court, and that we do not feel called upon to express our own opinion in regard to them. Criticisms of this char-

acter are completely covered by the recent decisions of this court in Benson vs. Henkel, 198 U. S., 1, as well as in the cases of *Ex parte* Watkins, 3 Pet., 193, 206; and *Ex parte* Parks, 93 U. S., 18, 20, in both of which the petitioners sued out writs of *habeas corpus* to review the validity of certain indictments under which they had been convicted in the courts below, and in both this court declined to review the action of the court below. It was held that the question whether the act charged was or was not a crime was one which the trial court was competent to decide, and which this court would not review upon a writ of *habeas corpus.*"

Hyde *vs.* Shine, 199 U. S., 62, 83, and 84.

We also contend that the court will not examine the facts alleged to ascertain whether they are sufficient to sustain the conviction and judgment, nor into errors or irregularities in the proceedings in the police court.

Hyde *vs.* Shine, 199 U. S., 84.
Ex parte Bigelow, 113 U. S., 330.
In re Belt, 159 U. S., 95.
Davis *vs.* Beson, 133 U. S., 333.
Toy Toy *vs.* Hopkins, 212 U. S., 542.
Ex parte Kearney, 7 Wheat., 38.
Ex parte Watkins, 3 Pet., 193.
Ex parte Siebold, 100 U. S., 371.
Ex parte Terry, 128 U. S., 289.
Kaizo *vs.* Henry, 211 U. S., 146.
Ex parte Harding, 120 U. S., 782.
Matter of Moran, 203 U. S., 96.

"In the Federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his discharge. In this case, however, the production of the indictment made at least a *prima facie* case

against the accused, and if the commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause. *In re* Oteiza, 136 U. S., 330; Bryant *vs.* U. S., 167 U. S., 104."

Hyde *vs.* Shine, 199 U. S., 84.

In *Ex parte* Bigelow the writ was refused where defense of former jeopardy was denied by the Supreme Court of the District of Columbia for the reasons:

"That court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and decide upon the defenses offered by him. The matter now presented was one of these defenses. Whether it was a sufficient defense was a matter of law on which the court must pass so far as it was purely a question of law, and on which the jury under the instructions of the court must pass if we can suppose any of the facts were such as required submission to the jury."

Ex parte Bigelow, 113 U. S., 330.

In re Belt application for leave to file a petition for the writ of *habeas corpus* was denied. The petitioner had been indicted, tried, convicted, and sentenced in the Supreme Court of the District of Columbia for a second offense of larceny. At the trial of the case, after proof of the special offense, the prosecution proceeded to prove that it was the defendant's second offense of the kind by offering in evidence the record of his previous conviction of the crime of larceny in the police court of the District of Columbia. To the admission of this record in evidence objection was made on the ground that it showed on its face a waiver of the right of trial by jury on the part of the prisoner and a trial and conviction by the court alone without a jury, a method of

procedure claimed to be in violation of the Constitution of the United States and therefore null and void.

After a review of authorities the court said:

> "Without in the least suggesting a doubt as to the efficacy, value, and importance of the system of trial by jury in criminal as well as in civil actions, we are clearly of opinion that the Supreme Court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offense, and this being so, we cannot review the action of that court and the Court of Appeals in this particular on *habeas corpus*.
>
> "The general rule is that the writ of *habeas corpus* will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors."
>
> *In re* Belt, 159 U. S., 95, 99, 100.

In Davis *vs.* Beson, Davis was indicted with others for conspiracy to obstruct the election law of the Territory of Idaho and for taking oath that he was not a member of the Mormon Church in violation of a territorial statute. He was found guilty and sentenced to pay a fine and in default to be imprisoned, and he then sued out a writ of *habeas corpus* on the ground that the facts in the indictment and record did not constitute a public offense and the acts charged were not crimes or punishable under any statute or law of the Territory.

Mr. Justice Field said:

> "On this appeal our only inquiry is whether the District Court of the Territory had jurisdiction of the offense charged in the indictment of which the defendant was found guilty. If it had jurisdiction, we can go no further. We cannot look into any alleged

errors in its rulings on the trial of the defendant. The writ of *habeas corpus* cannot be turned into a writ of error to review the action of that court. *Nor can we inquire whether the evidence established the fact alleged, that the defendant was a member of the order or organization known as the Mormon Church, called the Church of Jesus Christ of Latter Day Saints, or the fact that the order or organization taught and counseled its members and devotees to commit the crimes of bigamy and polygamy as duties arising from membership therein. On this hearing we can only consider whether, these allegations being taken as true, an offense was committed of which the territorial court had jurisdiction to try the defendant.* And on this point there can be no serious discussion or difference of opinion. Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho."

Davis *vs.* Beson, 133 U. S., 333.

In Toy Toy *vs.* Hopkins it appeared that Toy Toy and Columbus George, both Indians, were jointly indicted in a State court in Oregon for the crime of murder of an Indian woman on the United States Indian reservation in Umatilla County, Oregon; they were separately tried and convicted, and each was sentenced to death. Columbus George appealed from the judgment of conviction on the ground that the State court was without jurisdiction, inasmuch as the crime was committed by Indians on an Indian reservation, and that it was therefore within the exclusive jurisdiction of the Federal courts. This contention was upheld. Thereupon the defendants were indicted under section 5339 of the Revised Statutes in the circuit court of the United States for the district of Oregon, and were regularly tried and convicted of murder and sentenced to life imprisonment. After refusal by this court to grant leave to file a petition for the writ of *habeas corpus* a petition for such writ was filed in the

circuit court of the United States for the western district of Washington, denied by that court, and an appeal was taken to this court.

The petition alleged that the murdered person was killed on a tract of land which had once been part of an Indian reservation in the State of Oregon, but that long prior to her death the said tract had been allotted to another, and a patent for said lands had been duly assigned to her by the United States; that therefore the premises whereon the murder had been committed had ceased to be a part of said Indian reservation; that at the time of the killing, petitioner was a citizen of the United States and of the State of Oregon, and that the act of Congress under which he had been convicted and sentenced is unconstitutional and void when applied to the facts set out. This court said:

> "If such were the facts and they made out a want of jurisdiction under the applicable statutes, which on the merits we do not hold, the circuit court, nevertheless, was authorized to hear and pass upon those questions in the first instance, and its decision was open to review in the appellate court by writ of error. *But it could not be attacked collaterally as absolutely void*, and *habeas corpus* cannot be availed of as a writ of error."
>
> Toy Toy *vs.* Hopkins, 212 U. S., 542, 548.

> "The question whether this offense was or not committed; that is, whether the inquest, which is substituted for a verdict on an indictment, did or did not show that the offense had been committed, was a question which the court was competent to decide. The judgment it gave was erroneous; but is a judgment, and, until reversed, cannot be disregarded."
>
> *Ex parte* Watkins, 3 Pet., 193.

> "There are other limitations of the jurisdiction however, arising from the nature and objects of the writ itself, as defined by the common law, from which

its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence upon a return to a *habeas corpus*, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless perhaps where the court has recognizance by writ of error or appeal to review judgment. In such a case if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on *habeas corpus* and thus save the party the delay and expense of a writ of error. Bac. Abr. *Hab. Cor.* b. 13; Bethell's Case Salik., 348; 5 Mod., 19. But the general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by *habeas corpus*.

"The only ground on which this court or any other court without special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void."

Ex parte Siebold, 100 U. S., 371.

Ex parte Terry was a contempt case. The question considered was whether the petition showed that the prisoner was entitled to the writ on the ground that the Circuit Court of the United States for the Northern District of California had failed to take such steps as were necessary to give jurisdiction of the person of the prisoner at the time its order was made committing to jail for contempt, and that therefore the order was illegal and the writ should be awarded. The court said:

"If this position is sound, the conclusion stated would necessarily follow; for while the writ may not be used to correct mere errors or irregularities, *how-*

ever flagrant, committed within the sphere of the authority of the court, it is an appropriate writ to obtain the discharge of one imprisoned under the order of a court of the United States which does not possess jurisdiction of the person or of the subject-matter. * * * The question, it must be observed, does not involve an inquiry into the truth of the specific facts recited in the order of commitment, as constituting the contempt. As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, *these facts cannot be re-examined or reviewed in this collateral proceeding.*"

Ex parte Terry, 128 U. S., 289.

Kaizo *vs.* Henry was a case where the petitioner had been indicted and convicted of murder and asked to be discharged on *habeas corpus* because certain of the grand jurors who found the indictment were disqualified. It was held that the court which sentenced the petitioner had jurisdiction; that the indictment though voidable was not void, and if error had been committed by the trial court it could not be corrected by proceedings in *habeas corpus*.

Kaizo *vs.* Henry, 211 U. S., 146.

This court has no jurisdiction to discharge a person on *habeas corpus* who is imprisoned under the sentence of a territorial court in a criminal case on account of irregularities in the proceedings. The objections that the grand jury was improperly constituted and that the defendant was denied compulsory process for witnesses, do not go to the jurisdiction of the court.

Ex parte Harding, 120 U. S., 782.

Compelling the accused to stand up and walk before the jury, and stationing the jury during a recess so as to observe his size and walk, even if contrary to the fifth amendment to the Federal Constitution, do not affect the jurisdiction of the court so as to justify relief by *habeas corpus*.

Matter of Moran, 203 U. S., 96.

The record discloses that the police court had jurisdiction of the class of offenses mentioned in the information and power and authority to render judgment against petitioner, and, therefore, that judgment is not subject to collateral attack for any supposed deficiency in the information or of facts in the agreed statement or for any other irregularity. The petition is not based on any of these matters, but is founded solely on the proposition that the *statute* is unconstitutional, and we maintain, therefore, that nothing but the constitutionality of the *statute* is before the court in this proceeding.

The Constitutionality of the Act.

1. The prosecution was under section 1177, *only*, which makes it an offense to "*in any manner* engage in *any gift enterprise* in the District," without defining "gift enterprise."

This section, standing alone, is complete, and is unquestionably valid as a proper exercise of the police power, for, first,

> "The phrase (gift enterprise) has attained such notoriety as to justify us in taking judicial notice of what is meant and understood by the use of it."
> Lohman *vs.* State, 81 Ind., 15, 18.

> "The gift enterprise is a species of lottery."
> 19 Am. & Eng. Ency. of Law, 2d ed., p. 590, citing Meyer *vs.* State, 112 Ga., 20; Reg. *vs.* Harris, 10 Cox C. C., 352; Reg. *vs.* Freeman, 18 Ont., 524; Cross *vs.* People, 18 Colo., 321; Dunn *vs.* People, 40 Ill., 465; Davenport *vs.* Ottawa, 54 Kansas, 711; State *vs.* Moren, 48 Minn., 555; U. S. *vs.* Wallis, 58 Fed. Rep., 942; State *vs.* Mumford, 73 Mo., 647; Reg. *vs.* Parker, 9 Manitoba, 203; Randle *vs.* State, 42 Texas, 580; State *vs.* Bryant, 74 N. Car., 207.

A gift enterprise is—

> "in common parlance a scheme for the distribution of certain articles of property to be determined by chance among those who have taken shares in the scheme."
>
> 20 Cyc., 1188.

Second, whether the facts in evidence or the information or the procedure, etc., are sufficient may not be considered, or they are sufficient, under the authorities heretofore cited.

Third, the objects of the act and the means employed are reasonable, are uniform in their application, and are in the class universally upheld as within the police power.

2. If section 1177 must be read with section 1176, and even if it be then found that the definition in 1176 may reach personal or property rights protected by the Constitution, still the invalidity of the conviction does not follow, for

First, the offense created by section 1176 is for engaging "in said business (of gift enterprise) as defined in said act (Leg. As. D. C.), *or otherwise,*" and the conviction may be sustained even if we strike out as invalid the prohibition against the offense *as defined.* The law, as above shown, is separable and, since the offense is clear and the act is complete without the definition, the question as to the constitutionality of the expunged part is immaterial.

State Freight Case, 15 Wal., 232, 282.
Supervisors *vs.* Stanley, 105 U. S., 305, 313.
Virginia Coupon Cases, 114 U. S., 269, 304-5, 307.
In re Chapman, 166 U. S., 661, 666, 667.
Erie R'y *vs.* Pa., 15 Wal., 282, 283.
Trade Mark Cases, 100 U. S., 82, 98.
Ratterman *vs.* Western Union, 127 U. S., 411, 424.
Telegraph Co. *vs.* Charleston, 153 U. S., 692, 698.

Baldwin *vs.* Franks, 120 U. S., 678, 688, 689.
Pollock *vs.* Farmer's L. & Tr., 158 U. S., 636.
Presser *vs.* Ill., 116 U. S., 252, 263.
Packet Co. *vs.* Keokuk, 95 U. S., 80, 89.
R'y *vs.* Gutierrez, 215 U. S., 87, 96.
Penniman's Case, 103 U. S., 714, 717.
Unity *vs.* Burrage, 103 U. S., 447, 459.
Hyde *vs.* Railway, 31 App. D. C., 466.

Second, these were questions which the trial court had jurisdiction to decide and even if that court erred, this court will not review its decision on *habeas corpus,* under the cases heretofore cited.

3. While not necessary, therefore, to do so, we do, nevertheless, show that it is within the province of the Congress under the police power to prohibit the "business" of "gift enterprises" as defined by section 1176 and as carried on in this District by the trading stamp company.

There can be no question that Congress can exercise the full police power of the National Government in the District of Columbia and its power is at least co-extensive with that of the legislature of a State.

Loughborough *vs.* Blake, 5 Wheat., 324.
Cohens *vs.* Virginia, 6 Wheat., 424.
Kendall *vs.* U. S., 12 Peters, 619.
Mattingly *vs.* District of Columbia, 97 U. S., 690.
Shoemaker *vs.* U. S., 147 U. S., 300.
Parsons *vs.* District of Columbia, 170 U. S., 52.
Capital Traction Company *vs.* Hof., 174 U. S., 5.
Wright *vs.* Davidson, 181 U. S., 384.
El Paso. Ry Co v Gutierrez 215 U. S. 87, 96

The language of the definition is so comprehensive as to embrace, possibly, acts perfectly harmless as well as acts detrimental. There are two ways of meeting this situation.

First, by applying the rule that a

> "possible application to extreme cases is not the test of the reasonableness of public rules and regulations."
> Lemieux *vs.* Young, 211 U. S., 459.

Second, by construction,

> "the statute will be allowed its full force and operation, as applicable to all cases, rightfully and constitutionally within its provisions, but such application will be restrained as to those objects simply to which the statute is forbidden to extend. This is the rule, as we understand it, upon which the Supreme Court acted in the State Freight Tax Case, 15 Wall., 232; Supervisors *vs.* Stanley, 105 U. S., 305, 313; Virginia Coupon Cases, 114 U. S., 269, and other cases that could be cited."
>
> Chapman *vs.* U. S., 5 App. D. C., 122, 131.
> *In re* Chapman, 166 U. S., 667.
> State Freight Case, 15 Wall., 232, 282.
> Supervisors *vs.* Stanley, 105 U. S., 305, 313.
> Virginia Coupon Cases, 114 U. S., 269, 304, 305, 307.
> Erie R'y *vs.* Pa., 15 Wall., 282, 283.
> Trade Mark Cases, 100 U. S., 82, 98.
> Ratterman *vs.* Western Union, 127 U. S., 411, 424.
> Telegraph Co. *vs.* Charleston, 153 U. S., 692, 698.
> Baldwin *vs.* Franks, 120 U. S., 678, 688, 689.
> Pollock *vs.* Farmer's L. & Tr., 158 U. S., 636.
> Presser *vs.* Ill., 116 U. S., 252, 263.
> Packet Co. *vs.* Keokuk, 95 U. S., 80, 89.
> R'y *vs.* Gutierrez, 215 U. S., 87, 96.
> Penniman's Case, 103 U. S., 714, 717.
> Unity *vs.* Burrage, 103 U. S., 447, 459.
> Hyde *vs.* Railway, 31 App. D. C., 466.

As was said in Lansburgh *vs.* D. C., 11 App. D. C., 528:

> "We do not feel called upon at this time to undertake a specification of the particular conditions in

which the act under consideration might or might not apply to *actual merchants* in the *ordinary course* and practice of competitive business, or to determine just what character of inducements by way of gift or premium may, and may not, be held out to purchasers at the time and as a part of their purchases."

For (page 531)

"Although one of the most shrewdly planned of the many devices to obtain something for nothing, and one apparently entirely novel, it could hardly come more clearly within the scope of the statute had it been well known and expressly in the contemplation of Congress at the time of the enactment."

"The Washington Trading Stamp Company and its agents are not merchants engaged in business as that term is commonly understood. They are not dealers in ordinary merchandise, engaged in a legitimate attempt to obtain purchasers for their goods by offering fair and lawful inducements to trade. Their business is the exploitation of nothing more or less than a cunning device."

"With no stock in trade but that device and the necessary books and stamps and so-called premiums with which to operate it successfully, they have intervened in the legitimate business carried on in the District of Columbia between seller and buyer, not for the advantage of either, but to prey upon both."

This finding was substantially reiterated by the same court (page 42 of petition). See also dissenting opinion in

State *vs.* Sperry and Hutchinson Co., 126 N. W. Rep., 120.

Ex parte Hutchinson, 137 Fed. Rep., 950, citing Hewin *vs.* Atlanta, 121 Ga., 723.

The business or scheme or device as conducted by the trading stamp company has been prohibited, in the District, by Congress, under a valid exercise of the police power, in-

dependently of the question as to whether or not it is a species of lottery.

The retail merchant pays $3.50 for a thousand stamps and gives them to cash purchasers of $100.00 worth of goods. It is first a tax upon the merchant of 3½ per cent upon the *selling price, not cost price* of his goods. Necessarily he must add 3½ per cent to his selling price. General adoption by retail merchants would mean that the clerk who gets $100.00 per month would find its purchasing power reduced to $96.50 per month—the equivalent of a 3½ per cent decrease in his earning capacity, unless the stamps have a value. If the stamps were worth $3.50 per thousand in the hands of the clerk-customer, there would be no profit for the stamp company. If the purpose were cash redemption or a cash discount, there would be no need of the stamps, no need of the company, as the merchant can and does allow that without the intervention of a third party. This is nothing new. If all the stamps were redeemed in cash, the clerk-customer would receive back $1.00 only—a loss of 2½ per cent of his earning capacity; *but only one stamp is redeemed for each nine issued. The exact figures are: stamps issued, 3,755,457; redeemed, 421,750* (*Petition, page 27*). The substantial result of allowing the trading stamp companies to operate here may be the reduced earning capacity of the people by 3½ per cent—*the loss to the community of one man in thirty—and we can't afford it.*

"To legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity" is an exercise of police power.

Barbier *vs.* Connolly, 113 U. S., 27.

The scheme cleverly brings this about by offering premiums of greater value as an inducement to the customer to compel the merchant to buy the stamps (Petition, 27) and give them to the customer, and then as cleverly throws

hindrances in the way of redemption by requiring 990 of the tiny things to be pasted in 990 tiny squares in a book, by requiring consent for transfer, &c., &c., thus making certain their loss and the company's gain—that only one in nine may be redeemed.

The police power is certainly ample to prohibit the conduct of such a business.

> "We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."
>
> C., B. & Q. Ry. *vs.* Drainage Commissioners, 200 U. S., 561, 592.

Citing—

Lake Shore & Michigan So. Ry. *vs.* Ohio, 173 U. S., 285, 292;
Gillman *vs.* Philadelphia, 3 Wall., 713, 729;
Pound *vs.* Turck, 95 U. S., 459, 464;
Ry. Co. *vs.* Husen, 95 U. S., 470, and
Barbier *vs.* Connolly, 113 U. S., 27, 31, and 32.

> "That power * * * embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals, or the public safety."
>
> Bacon *vs.* Walker, 204 U. S., 311, 317.

In Otis *vs.* Parker, 187 U. S., 606, the court held that the provision of the constitution of California that "all contracts for the sales of shares of the capital stock of any corporation or association on margin, or to be delivered at a future day, shall be void, and any money paid on such contracts may be recovered by the party paying it by suit in any court of competent jurisdiction," is not contrary to the first section

of the Fourteenth Amendment to the Constitution of the United States.

Otis *vs.* Parker, 187 U. S., 606.

The court said (page 609):

> "Even if the provisions before us should seem to us not to have been justified by circumstances locally existing in California at the time it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what the policy required. Such a deep-seated conviction is entitled to great respect. If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it is a clear, unmistakable infringement of rights secured by fundamental law.
>
> "* * * Take cases where opinion has moved in the opposite direction; wagers may be declared illegal without the aid of statute, or lotteries forbidden by express enactment, although at an earlier day they were thought pardonable at least."

The court said (page 608):

> "The objection urged against the provision in its literal sense is that this prohibition of all sales on margin bears no reasonable relation to the evil sought to be cured, and therefore falls within the first section of the Fourteenth Amendment. It is said that it unduly limits the liberty of adult persons in making contracts which concern only themselves, and cuts down the value of a class of property that often must be disposed of under contracts of the prohibited kind if it is to be disposed of to advantage, thus depriving persons of liberty and property without due process of law, and that it unjustifiably discriminates against property of that class, while other familiar objects of speculation, such as cotton or grain, are not touched,

thus depriving persons of the equal protection of the laws.

"It is true, no doubt, that neither a State legislature nor a State constitution can interfere arbitrarily with private business or transactions, and that the mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts. Mugler *vs.* Kansas, 123 U. S., 623, 661; Lawton *vs.* Steele, 152 U. S., 133, 137. But general propositions do not carry us far. While courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which are by no means held *semper ubique et ab omnibus.*

"Even if the provision before should seem to us not to have been justified by the circumstances locally existing in California at the time it was passed, it is shown by its adoption to have expressed a deep-seated conviction on the part of the people concerned as to what that policy required. Such a deep-seated conviction is entitled to great respect. If the State thinks that an admitted evil cannot be prevented except by prohibiting a calling or transaction not in itself necessarily objectionable, the courts cannot interfere, unless, in looking at the substance of the matter, they can see that it 'is a clear, unmistakable infringement of rights secured by the fundamental law.' (Booth vs. Illinois, 184 U. S., 425, 429.)"

Otis *vs.* Parker, 187 U. S., 606.

"Is it true that the legislature is without power to forbid or suppress a particular kind of business, where such business, properly and honestly conducted, may not, in itself, be immoral? We think not.

"A calling may not in itself be immoral and yet the tendency of what is generally or ordinarily or often done in pursuing that calling may be towards that which is admitted immoral or pernicious. If, looking at all the circumstances that attend, or which may ordinarily attend, the pursuit of a particular calling, the State thinks that certain admitted evils cannot be successfully reached unless that calling be actually prohibited, the courts cannot interfere, unless, looking through mere forms and at the substance of the matter, they can say that the statute enacted professedly to protect the public morals has no real or substantial relation to that object is a clear, unmistakable infringement of the rights secured by the fundamental law."

Booth *vs.* Illinois, 184 U. S., 425, 429.

Prior to the adoption of the act construed in this case it was lawful in the State of Illinois to have or give an option to sell or buy at a future time grain or other commodities. Such contracts were neither void nor voidable at the common law. The statute made them unlawful or void in Illinois. It was argued that the State statute as interpreted by its highest court was not directed against gambling contracts relating to the buying or selling of grain or other commodities, but against mere options to sell or buy at a future time without any settlement by the parties upon the basis of differences, and therefore involving no element of gambling.

In Holden *vs.* Hardy this court held to be constitutional an act of the legislature of Utah limiting to eight hours per day work in underground mines and in smelters, and reviewed many cases of this court under the 14th amendment.

In the course of the decision Mr. Justice Brown said (page 385):

> "An examination of both these classes of cases under the 14th amendment will demonstrate that, in passing upon the validity of State legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the public, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had been formerly laid upon the conduct of individuals, or on classes of individuals, had proved detrimental to their interest; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection."

Then after reviewing the marvelous changes in the criminal law pleading as to married women, imprisonment for debt and exemption from execution, and other changes, he said (page 387):

> "They are mentioned only for the purpose of calling attention to the probability that other changes of no less importance may be made in the future, and that while the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuations, and that *the Constitution* of the United States, which is necessarily and to a large extent unflexible and exceedingly difficult to amend, *should not be so construed as to deprive the States of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare without bringing them into conflict with the supreme law of the land.*"

After a further review of cases applying the principle that all property is

> "held subject to those general regulations which are necessary to the common good and general welfare" (page 392),

and the right to contract is a right of property and "liberty" under the Constitution, he further said (page 397):

> "But the fact that both parties are of full age and competent to contract does not necessarily deprive the State of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself, 'these States still retain an interest in his welfare, however reckless he may be. *The whole is no greater than the sum of the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.*'"
>
> Holden *vs.* Hardy, 169 U. S., 366.

In Knoxville Iron Co. *vs.* Harbison, 183 U. S., 13, this court sustained a statute of Tennessee as a valid exercise of the police power, requiring all persons, firms, and corporations to redeem in cash, if demanded, all store orders or other evidences of indebtedness given to employees or laborers in payment of labor, such redemption to be at the face value of the evidence of indebtedness.

In Lemieux *vs.* Young this court sustained the validity of the "sale in bulk" statute, making void as against creditors, sales of the whole or a large part of the stock in trade of a person whose business is selling goods in small quantities, unless made under the many restrictions specified.

On page 493 the court said:

> "Insolvent and fraudulent vendors are those who will be chiefly affected by the act, and it is for the protection of creditors against sales by them of their

entire stock at a single transaction, and not in the regular course of business, that its provisions are aimed. It is, of course, possible that an honest and solvent retail dealer might, in consequence of the required notice before the sale, lose an opportunity of selling his business or suffer some loss from the delay of a sale occasioned by the giving of such notice, but a 'possible application to extreme cases' is not the test of the reasonableness of public rules and regulations' * * * 'the essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public.' * * * 'Twenty States as well as the Federal Government in the District of Columbia, have similar statutes, some with provisions more stringent than our own, and all aim at the suppression of an evil that is thus shown to be almost universal.' "

The above is cited with approval from dissenting opinion in Wright *vs.* Hart, 182 N. Y., 350.

The court again announces the principle:

> "As the subject to which the statute relates was clearly within the police power of the State the statute cannot be held to be repugnant to the due process clause of the 14th Amendment, because of the nature or character of the regulations which the statute embodies unless it clearly appears that those regulations are so far beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. Booth *vs.* Illinois, 184 U. S., 425."
>
> Lemieux *vs.* Young, 211 U. S., 489.

In Western Turf Association *vs.* Greenberg, this court sustained the constitutionality, under the 14th amendment, of a statute of California, making it unlawful to refuse admission to a place of public amusement of one holding a ticket thereto and giving the injured party the right to re-

cover one hundred dollars in addition to actual damages sustained by him. On page 364 the court said:

> "The race-course in question being held out as a place of public entertainment and amusement is, by the act of the defendant, so far affected with a public interest, that the State may, in the interest of good order and fair dealing, require defendant to perform its engagement to the public and recognize its own tickets of admission in the hands of persons entitled to claim the benefits of the statute. That such a regulation violates any right of property secured by the Constitution of the United States cannot, for a moment be admitted."
>
> Western Turf Association *vs.* Greenberg, 204 U. S., 359, 364.

The legislature of Illinois passed an act regulating the storage of grain, declaring storehouses for such purposes to be public warehouses and fixing the prices for storing.

This court held that this business was impressed with a public use and might be regulated.

> "Under such circumstances it is difficult to see why, if the common carrier, or the miller or the ferryman, or the innkeeper or the wharfinger, or the baker or the cartman, or the hackney-coachman, pursues a public employment and exercises 'a sort of public office,' these plaintiffs in error do not. They stand, to use again the language of their counsel, in the very 'gateway of commerce,' and take toll from all who pass. Their business most certainly 'tends to a common charge, and is become a thing of public interest and use.' Every bushel of grain for its passage 'pays a toll which is a common charge,' and therefore, according to Lord Hale, every such warehouseman 'ought to be under public regulation, viz., that he * * * take but reasonable toll.' Certainly, if any business can be clothed 'with a public interest and cease to be *juris privati* only' this has been. It may not be made so by the operation of the constitution of Illinois or this statute, but it is by the facts."

"But a mere common-law regulation of trade or business may be changed by statute. A person has no property, no vested interest in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law, cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim of the legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one."

"For our purposes, we must assume that, if a state of facts could exist that would justify such legislation, it actually did exist when the statute now under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we may declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls, not to the courts."

Munn *vs.* Illinois, 94 U. S., 113.

The Supreme Court of Minnesota holds that the trading stamp company is conducting a business affecting the public interest.

State *vs.* S. & H. Co., 126 N. W. Rep., 120.

In the case of Clark *vs.* Nash this court upheld as constitutional a statute of Utah permitting individuals to enlarge the ditch of another to obtain water for his own use, as within the legislative power of the State, and as being a public use.

The court said (page 368):

> "The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual. * * * Those facts must be general, notorious and acknowledged in the State, and the State courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the State, which would in all probability flow from a denial of its validity."
>
> Clark *vs.* Nash, 198 U. S., 361, 369.

In Atkin *vs.* Kansas this court sustained a statute of that State limiting the hours of labor on public works in the State to eight.

The court said (page 223):

> "So, also, if it be said that a statute like the one before us is mischievous in its tendencies, the answer is that the responsibility therefor rests upon legislators, and not upon the courts. No evils arising from such legislation could be more far reaching than those that might come to our system of government if the judiciary, abandoning the sphere assigned to it by the fundamental law should enter the domain of legislation, and upon grounds merely of justice or reason or wisdom, annul statutes that had received the sanction of the people's representatives. We are reminded by counsel that it is the solemn duty of the courts in cases before them to guard the constitutional rights

of the citizen against merely arbitrary power. That is unquestionably true. But it is equally three—indeed, the public interests imperatively demand—that legislative enactments should be recognized and enforced by the courts as embodying the will of the people, unless they are plainly and palpably, beyond all question, in violation of the fundamental law of the Constitution."

Atkin *vs.* Kansas, 191 U. S., 207.

In Bacon *vs.* Walker the court sustained a statute of Idaho prohibiting the grazing of sheep on the public domain within two miles of any dwelling. After citing the cases of Clark *vs.* Nash, 198 U. S., 361; Strickland *vs.* Mining Co., 200 U. S., 527; Offield *vs.* Railroad, 203 U. S., 372; Ohio Oil Co. *vs.* Indiana, 177 U. S., 190, the court says (page 317):

"These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a State, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in Chicago, Burlington & Quincy Railway Company *vs.* Drainage Commissioners, 200 U. S., 561, 592. In that case we rejected the view that the police power cannot be exercised for the general well being of the community. That power, we said, embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety. We do not enter, therefore, into the discussion whether the sheep industry is legitimate and not offensive. Nor need we make extended comment on the two-mile limit. The selection of some limit is a legislative power, and it is only against the abuse of the power, if at all, that the courts may interpose. But the abuse must be shown. It is not shown by quoting the provision which expresses the limit."

Bacon *vs.* Walker, 204 U. S., 311.

In Orient Insurance Company *vs.* Daggs this court held to be constitutional an act of the Missouri legislature denying insurance companies the right to deny that property insured was worth at the time of the issuance of the policy the full amount of insurance therein. The objections were that it abridges the privileges or immunities of citizens of the United States, denies persons within its jurisdiction the equal protection of the laws, and deprives persons of property without due process of law.

Again announcing the principle announced in Magoun *vs.* Illinois Trust and Savings Bank, 170 U. S., 283, that—

> "The State may distinguish, select and classify objects of legislation, and necessarily the power must have a wide range of discretion."

And that—

> "Classification for such purpose is not invalid because not depending on scientific or marked differences in things or persons or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary." (Page 562.)

After pointing out the purpose of the legislature to make such policies

> "true contracts of insurance, not seemingly so, but really so"

the court in sustaining the law said, page 565, 566:

> "The State surely has the power to determine that this result is desirable, and to accomplish it even by the limitation of the right of contract claimed by plaintiff in error.
>
> "It would be idle trite to say that no right is absolute. *Sic utere tuo ut alienum non loedas* is of universal pervading obligation. It is a condition upon which all property is held. Its application to particular conditions must necessarily be within the reasonable discretion of the legislative power. When such

discretion is exercised in a given case by means appropriate and which are reasonable, not oppressive or discriminatory, it is not subject to constitutional objection. The Missouri statute comes within this rule."

Orient Insurance Company *vs.* Daggs, 172 U. S., 557, cited with other cases in

St. Louis, Iron Mountain, etc., Ry. *vs.* Paul, 173 U. S., 404, 409.

In Lawton *vs.* Steel, this court reviewed and held to be constitutional an act of the New York legislature authorizing any person to abate, remove and forthwith destroy fish nets set or maintained upon waters of the State, as the lawful exercise of police power of the State. The court said (page 136):

> "The State may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. Barbier *vs.* Connolly, 112 U. S. 27; Kidd *vs.* Pearson, 128 U. S., 1. To justify the State in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the abolishment of the purpose and not under oppressive upon individuals."

The court next says (page 138) that—

> "The preservation of game and fish, however, has always been treated as within the proper domain of the police power"

and

> "The main and only real difficulty connected with the act in question is in its declaration that any net, etc., maintained in violation of any law for the pro-

tection of fisheries, is to be treated as a public nuisance, 'and may be abated and summarily destroyed by any person.' "

On page 140 this principle is announced:

> "An act of the legislature which *has* for its object the preservation of the public interests against the illegal depredations of private individuals ought to be sustained unless it is plainly violative of the Constitution or subversive of private rights. * * * While the legislature has no right to arbitrarily declare that to be a nuisance which is clearly not so, a good deal must be left to its discretion in that regard, and if the object to be accomplished is conducive to the public interests, it may exercise a large liberty of choice in the means employed."
>
> Lawton *vs.* Steel, 152 U. S., 133.

In Crowley *vs.* Christensen the right to sell intoxicating liquor at retail was asserted to be within the protection of the Constitution and not within the police power. On page 90 the court said:

> "It is urged, that, as the liquors are used as a beverage, and the injury following them, if taken in excess, is voluntarily inflicted and is confined to the party offending, their sale should be without restrictions, the contention being that what a man shall drink, equally with what he shall eat, is not properly matter for legislation.
>
> "There is in this position an assumption of a fact which does not exist, that when the liquors are taken in excess the injuries are confined to the party offending. The injury, it is true, first falls upon him in his health, which the habit undermines; in his morals, which it weakens; and in the self-abasement which it creates. But, as it leads to neglect of business and waste of property and general demoralization, it affects those who are immediately connected with and dependent upon him. * * * As it is a business attended with danger to the community it may, as already said, be entirely prohibited, or be permitted

under such conditions as will limit to the utmost its evils. The manner and extent of regulation rests in the discretion of the governing authority."

Crowley *vs.* Christensen, 137 U. S., 86.

In Barbier *vs.* Connolly, the court sustained a municipal ordinance of San Francisco prohibiting washing and ironing in public laundries within certain territorial limits at certain hours, as a police regulation.

The court said, on pages 31, 32:

"But neither the amendment (the Fourteenth)—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

Barbier *vs.* Connolly, 113 U. S., 27.

In Patterson *vs.* Kentucky this court held that one having letters patent for "an improved burning oil" was not entitled to sell it in violation of a State law forbidding the sale of oils which ignite or permanently burn at a temperature less than 130° Fahrenheit.

The court said, on page 504:

> "Whether the policy thus pursued by the State is wise or unwise it is not the province of the national authorities to determine. That belongs to each State, under its own sense of duty, and in view of the provisions of its own constitution. Its action, in those respects, is beyond the corrective power of this court."

And again, on page 505:

> "It was held by Chief Justice Shaw to be a settled principle, growing out of the nature of well-ordered society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the comunity. Commonwealth *vs.* Alger, 7 Cush., 53.'

This court has,

> "with marked distinctness and uniformity, recognized the necessity, growing out of the fundamental conditions of civil society, of upholding State police regulations which were enacted in good faith, and had appropriate and direct connection with that protection to life, health, and property, which each State owes to her citizens" (p. 506).
>
> Patterson *vs.* Kentucky, 97 U. S., 501.

In Powell *vs.* Pennsylvania, this court upheld a statute of that State forbidding the manufacture and sale of oleomargarine.

At page 684 the court said:

> "The main proposition advanced by the defendant is that his enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, is an essential part of his rights of liberty and property, as guaranteed by the Fourteenth Amendment. The court assents to this general proposition as embodying a sound principle of constitutional law. But it cannot adjudge that the defendant's rights of liberty and property, as thus defined, have been infringed by the statute of Pennsylvania, without holding that, although it may have been enacted in good faith for the objects expressed in its title, namely, to protect the public and to prevent the adulteration of dairy products and fraud in the sale thereof, it has, in fact, no real or substantial relation to those objects. Mugler *vs.* Kansas, 123 U. S., 623, 661. The court is unable to affirm that this legislation has no real or substantial relation to such objects."

And at page 686, the court says:

> "The legislature of Pennsylvania, upon the fullest investigation, as we must conclusively presume, and upon reasonable grounds, as must be assumed from the record, has determined that the prohibition of the sale, or offering for sale, or having in possession to sell, for purposes of food, of any article manufactured out of oleaginous substances or compounds other than those produced from unadulterated milk or cream from unadulterated milk, to take the place of butter produced from unadulterated milk, will promote the public health, and prevent fraud in the sale of such articles. If all that can be said of this legislation is that it is unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine, as an article of food, their appeal must be to the legislature, or to the ballot-box, not to the judiciary. The latter cannot interfere

without usurping powers committed to another department of government."

Powell *vs.* Pennsylvania, 127 U. S., 678.

In Butchers' Union Company *vs.* Crescent City Company, plaintiffs had the exclusive right under statute of Louisiana to land and butcher stock at theri slaughter-houses which act, the court held, was a valid exercise of the police power (page 747). Later the right was taken away by legislative act giving municipalities the power to regulate within their limits and an ordinance passed thereunder. In sustaining the latter act the court held that the police power is "one so indispensable to the public welfare that it cannot be bargained away by contract."

Butchers' Union Company *vs.* Crescent City Company, 111 U. S., 746-750.

"But it is said that the statute in question does not regulate the carrying of lottery tickets from State to State, but by punishing those who cause them to be so carried Congress in effect prohibits such carrying; that in respect to the carrying from one State to another of articles or things that are, in fact, or according to usage in business, the subjects of commerce, the authority given Congress was not to *prohibit,* but only to *regulate.* * * * The power of Congress to regulate interstate commerce may sometimes be exerted with the effect of excluding particular articles from such commerce."

Lottery case, 188 U. S., 321, 354, 362.

"Unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of a citizen are unnecessarily and in a manner wholly arbitrarily interfered with or disturbed, without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference."

Gundling *vs.* Chicago, 177 U. S., 183, quoted in Williams *vs.* Kansas, decided April 4, 1910.

"It is also true that the police power of the State is not unlimited and is subject to judicial review, and when exerted in an arbitrary or oppressive manner such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, *the principles upon which such interference is warranted are as well settled as the right of judicial interference itself.* The legislature being familiar with local conditions is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with a legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power." Jacobson *vs.* Massachusetts, 197 U. S., 11; Mugler *vs.* Kansas, 123 U. S., 623; Minnesota *vs.* Barber, 136 U. S., 313, 320; Atkins *vs.* Kansas, 191 U. S., 207, 223.

"If the law in controversy has a reasonable relation to the protection of the public health, safety or life, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or because it is thought to be an unwise exertion of the authority vested in the legislative branch of the Government."

"We take it that there is no dispute as to the fundamental propositions of law which we have thus far stated."

McLean *vs.* Arkansas, 211 U. S., 539, 547, 548.

The element of chance in the trading-stamp scheme makes it a species of lottery.

In Horner *vs.* U. S., 149 U. S., 449, this court reviewed the plan of Austria to obtain a loan on bonds by which the purchaser of the bonds must certainly get his money back with interest. The plan, however, contemplated the award-

ing by chance of additional bonuses among the bondholders and also left the periods of maturity of the bonds to be determined by chance within certain fixed and named limitations. The court, on pages 461 and 462, reviews and quotes with approval the decision in Ballock *vs.* State, 73 Md., 1, to the effect that the uncertainty as to the time of maturity of the bonds was alone sufficient to condemn the old plan as "in the nature of a lottery."

On pages 463 and 464 many other cases are reviewed, the court saying:

> "As to what have been held to be lottery tickets by the courts of the several States, reference may be made to * * * Com. *vs.* Sheriff, 10 Phila., 203, where it was said that whatever amounted to the distribution of prizes by chance was a lottery, no matter how ingeniously the object of it might be concealed; Holoman *vs.* State, 2 Tex. App. 610, where it was held that selling boxes of candy at fifty cents each, each box being represented to contain a prize of money or jewelry, the purchaser selecting his box in ignorance of its contents, was a device in the nature of a lottery; State *vs.* Lumsden, 89 N. C., 572, where a like device was held to be a lottery; and Com. *vs.* Wright, 137 Mass., 250; * * * In Taylor *vs.* Smetten, L. R., 11, Q. B. Div., 207, packets were sold, each containing one pound of tea, at so much a packet, and in each packet was a coupon entitling the purchaser to a prize and that fact was stated publicly by the seller before the sale, but the purchasers did not know until after the sale, what prizes they were entitled to, and the prizes varied in character and value. The tea was good and worth the money paid for it. It was held that the transaction constituted a lottery, within the meaning of the statute."

The trading stamp company sells stamps to the merchant for three and one-half dollars per thousand, the merchant giving to his customer "one of said stamps for each and every ten cents represented in the retail price of goods" sold.

or one thousand for purchases amounting to one hundred dollars, thus costing the merchant 3½ per cent of the amount of his sales. The merchant may not redeem these stamps in either pens, cash or merchandise. They may not be redeemed even at his place of business nor at the time of the sale nor in any article then or there exhibited or to be seen by the customer.

The trading stamp company has an exhibition room of its own where are displayed articles which will be exchanged for a book in which have been pasted 990 stamps, two books containing 1,980 stamps, etc., the said articles having an average retail value of $2.25, $4.50, etc., but varying in value as well; that is to say, all of the articles for redemption for one book are not equal in value, nor are all of the articles redeemable for two books, etc.

There is nothing in the contract between the trading stamp company and the merchant nor in its general scheme of doing business which gives the customer of the merchant the right to select a premium in advance nor at the time of his purchase of merchandise from the merchant. The trading stamp collector has not the right to select an article displayed as a premium and require the trading stamp company to reserve that article for him. There is no obligation on the part of the company to have that article or one like it even when he has filled his book with stamps and presented it for redemption. If a collector desires a particular style of lamp, which he sees on exhibition and saves stamps and pastes them in the book for the purpose of securing that particular lamp, he has no right and it is not certain that when he has filled his book and presents it for redemption he will get that particular lamp; on the contrary, it is almost certain that that particular lamp will have been taken by another collector. He has no right to demand a lamp like that one nor to have a lamp at all, for there is no obligation upon the part of the company to *keep* any lamps in stock. The sum total of the representation is that at the present time the pre-

miums on exhibition are being given for stamps. Again, there is no obligation on the part of the company that the value of the premiums or of any particular premium or of any particular class of premiums will be $2.25 or any other sum. It is, therefore, entirely optional with the trading stamp company as to what article and what class of articles and as to the quality and *value* of the article that will be given.

The uncertainty in the practical operation of the scheme is further increased by the probability that proportionately very few customers visit the exhibition rooms of the trading stamp company before presenting their stamps for redemption, and the great majority who do not have never seen the premium at the time of making the purchases and receiving the stamps. A clear admission of uncertainty is found on page 23 of the petition in relation to the "tokens" thereinafter referred to, as follows:

"April 1, 1909.

> This list of tokens, which can be exchanged for 'S. & H' Green Trading Stamps, is subject to change without notice. Bring or send them in at once."

The present contract between the Sperry and Hutchinson Company and the merchant provides that the said stamps will be redeemed by the company for the merchant's customers:

First. With articles of general merchandise by obtaining 990 of said stamps or any multiple thereof; or

Second. In cash on the basis of ten cents per hundred; or

Third. With falcon pens on the basis of one stamp for a pen.

The Lansburgh case, 11 App. D. C., 512, was decided in December, 1897, when the business of said Sperry and Hutchinson Company was conducted upon the first of the

above plans only for redeeming the stamps; and if the scheme was contrary to the statute, its element of invalidity has not been removed by introducing, in addition thereto, the second and third plans above referred to, even if it can be shown that it would not be unlawful to redeem said stamps under conditions mentioned in said paragraphs two and three, alone, which we do not admit.

The defendant's *company* is practically the *same company* which operated the scheme under consideration in the Lansburgh case.

The *scheme* as now presented is the *same scheme* that was under consideration in that case, with one or two attempted illusory amendments.

In the Lansburgh case the so-called "premiums" were obtainable on the presentation of books of stamps exactly in the same manner as under the present. The present scheme has for its main, and practically only, object the "premium" feature. The cash value of one mill per stamp, redeemable in any number at the rate of one cent for ten stamps and in pens at the rate of one pen for each stamp, is simply a subterfuge—*an attempt to legitimate the premium scheme.* The very arrangement which was condemned by the Court of Appeals in the strongest terms in the Lansburgh case is completely, and in its full details, retained in the present scheme of the trading-stamp company. So long as this "premium" scheme is retained, and, as in this case, is operated as the main object, purpose and feature of the business, *the transaction is tainted* and comes within the condemnation of the Lansburgh case.

Without the allurement and active operation of the "premium" scheme, the business of the defendant cannot be carried on, for, as one court has said, "he rock upon which the system is built is the redemption of merchandise." That this is the object of the trading-stamp company is evident from the literature issued by it. It is also evident that the mer-

chant would not need the interference of a third party for the purpose of giving discounts in cash or in Falcon pens.

> "We cannot decline to consider such things as are of common knowledge to persons acquainted with business dealings, and we must assume that neither a merchant nor a trading-stamp company would intentionally engage in a business by which loss must necessarily be sustained. If the merchant only received the actual value of the goods sold he could not very long continue the practice of having a third party furnish some other article at his expense, and unless the third party in some way gets value for the articles delivered by him, his business career would be ordinarily short-lived. And it would seem to be equally clear that if the purchaser from the merchant always paid full value for the goods purchased and for the article obtained from the trading-stamp company, there would be but little inducement for them to make purchases in that way. But when they are led to believe that they have the chance of getting something in addition to their purchase, and especially when they do not know what it is to be, then it is unfortunately true that there are very many persons who would be thereby induced to make the purchase who would not otherwise do so. The uncertain, undetermined, or unknown is what attracts a large class of persons in every community, and it is dealing with the uncertain, undetermined or unknown that has ruined many, and the tendency to thus deal (appealing to the gambling instinct) is one of the evils of the present day. Lotteries, which were at one time expressly authorized by law, are now generally prohibited throughout this country—there are provisions against them in constitutions of many States including our own. Numerous statutes have been passed to prevent transactions which while not technically lotteries are so akin to them that they have some of the same evil results, and, when a statute is before a court for construction, which apparently seeks to correct such evils, it should not be too ready to declare it invalid, but, on the contrary, should sustain it, unless

> it clearly violates some rights guaranteed to those affected by it. If the inducement for the sale was a stamp which would enable the holder to get something which was uncertain, undetermined and unknown to him at the time of purchase, it would seem to be clear that the transaction involved the element of chance referred to in Long *vs.* State, and therefore not only cannot be justified by that decision, but is, by implication at least, condemned by it."
>
> State *vs.* Hawkins, 95 Md., 143, 144, 145.

That the "premium" scheme is its primary and only real object is demonstrated by its literature. In the stamp book issued by it the "premium" scheme is the only one featured or prominently presented.

To enable the holder of stamps to receive a premium, at least one book of 990 stamps must be filled; no premium can be obtained for less (Petition, 26). No premium can be obtained for 1,000 1,500 or any number except multiples of 990 and in books. On page 2 of the stamp book appears the following among other suggestions (Petition, 18):

> "To enable you more *quickly to fill your book* we have made arrangements to give you stamps," etc.
>
> "The stamps you get in this way, combined with those your merchants should give you with your purchases, make it very easy *to fill the books rapidly and obtain valuable 'premiums.'*
>
> "You cannot possibly appreciate the value and variety *of the merchandise we give as 'premiums' without visiting our premium parlor.* You will find there practically everything, and the best of everything, required in any home; all to be had, free of cost, for 'S. & H.' Green Trading Stamps."

Under the

> "Notice to the Public and to the Consumers of Our Subscribers (Petition, 20),

they are advised that the book and stamps are issued and received

"Pursuant to certain *restrictions* and *limitations* concerning their use contained in the written contracts made for your benefit between the undersigned and the merchants authorized to re-issue them. * * * *The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them or make any other use of them without our consent in writing.* We will in every case, where application is made to the undersigned, give you permission to turn over your stamps to any other *bona-fide* collector of 'S. & H.' Green Trading Stamps; *but if the stamps or the books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties. It is to your interest that you fill the book, and personally* derive the advantage and benefit *of exchanging it for your choice of the many useful and valuable articles supplied by us.*

"These stamps when received by you *must be pasted in the book* * * * Our stamps and *premiums* are restricted except as above, to our subscribers and their customers."

The manifest purpose of the suggestions appearing on page 18 of the petition is to stimulate the acquisition of stamps for the purpose of obtaining a "premium" and the very manifest purpose of the restriction contained in the "notice," appearing on page 20 of the petition, is to make it difficult to acquire the requisite number of stamps and obtain the premiums, for in the loss of the stamps or the inability of the collector to obtain a sufficient amount to fill the book lies the profit of the trading stamp company, and it is to its advantage that as few stamps as possible should be presented for redemption.

On the back, the very last page of the book, appears another "notice to the public" (Petition, 21), in which it is attempted to disguise the scheme by describing the stamp as a "discount," and the public is requested to call at defend-

ant company's store "and see the splendid line of goods representing 'the discount in merchandise' to which 'S. & H.' Green Trading Stamps entitles you."

Here for the first time appears in an inconspicuous manner the announcement "or if you prefer you may exchange those issued in Washington, D. C., for cash at the rate of one cent for ten stamps." The only other reference to the alleged cash and the only reference to the pen redemption is made upon the thirty complimentary stamps as shown on page 24 of the petition.

It further appears (Petition, 26) that defendant's company issues to the public a catalogue containing over forty pages of illustrations of over three hundred different classes of premiums, specifying the number of filled stamp books required to obtain any article, and no article is there listed or illustrated to be delivered except for a full book of 990 stamps or a certain multiple thereof, and *no mention is there made of cash or pens.*

The collector is met with encouragement to *try* to fill a book, with positive hindrances from actually accomplishing it—encouragement to demand the stamps from the merchant for which the company receives pay; restrictions and limitations upon their presentation for redemption, which costs the company something. "Fill your book," says the stamp book. "Fill your book," says the premium book. "Fill your book," as you thereby get 2¼ per cent "discount" in merchandise, says the agreed case, while cash for less than a full book or any number except an even 990 or 1980, etc., is only 1 per cent.

Why is it said that "the only right which you acquire in said stamps is *to paste them in books like this* and present them for redemption" *pasted in?* Why must I, in Mount Pleasant, and my friend in Anacostia or Georgetown get the consent of the company to transfer? This is a peculiar in-

cident to a "discount." "These stamps when received by you must be *pasted in the book.*"

The loss of stamps is not an incident merely of the "business." The scheme willfully, deliberately, cunningly and ingeniously contemplates and makes conditions which necessitate the purchase by the merchant of stamps which can never be presented for redemption.

That the company has no occasion to be disappointed in the results is shown by the fact that during its present career here it has been paid for 3,755,457 stamps and has had to redeem but 421,750 of them—one only out of nine.

Looking through form to substance, it must be apparent to the court that the addition of the cash or pen redemption is intended to conceal the real scheme and purpose of the trading-stamp company.

That a part of the trading-stamp company's plan of doing business is legitimate cannot have the effect of legalizing that portion which violates the law, and surely not when such part of the plan as is legitimate is used only for the purpose of concealing the real nature of the transaction and of furthering the purpose of carrying on the illegal business.

Assume that a company is engaged in the conduct of a lottery in which prizes from fifty cents to ten thousand dollars are offered, would the fact that the company guarantees that each ticket would at least draw a prize of fifty cents legitimate the lottery? Each purchaser of a ticket would know at the time of his purchase that he would be guaranteed and assured of at least fifty cents for his ticket, *but* "The fact that every person taking a chance is sure to get something of value does not prevent the transaction from being a lottery."

14 Enc. Law, 2d ed., 601, and authorities cited in note 1.

"The name by which a particular scheme is called cannot be allowed to effect an evasion of the law,

and the courts will, no matter how it is named, look in every case at the substance of a transaction to determine its character as a lottery."

19 Enc. Law, 2d ed., 589, and authorities in note 4.

Where a contract which is entire contains an illegal stipulation or agreement which is not severable from the balance of the contract, such illegal stipulation or agreement cannot be ignored and the other provisions of the contract enforced. The illegal stipulation or agreement in such a case penetrates and corrupts the whole contract and vitiates it as an entirety.

15 Amer. and Eng. Enc. Law, 988.
Williams *vs.* Hastings, 59 N. H., 373.

Where the consideration of a contract consists of several different elements, and no apportionment or separate valuation, or means of apportionment or valuation, of the different elements of the consideration is made by the parties, the entire contract will be held illegal if one of the elements of the consideration is immoral or against public policy.

15 Amer. and Eng. Enc., 989.
Robinson *vs.* Queen, 3 Metc., 159.
9 Cyc., 566.
Bishop *vs.* Palmer, 146 Mass., 469.

In the last-named case contract was entered into for the purchase of a business in consideration of a sale and delivery and the performance of certain conditions, the first of which was a general agreement without any limitation of space within which the said or similar business should not be carried on by the seller—held that the covenant was void as being in restraint of trade, and that not being severable

from the rest of the consideration no action would lie for the enforcement of the unpaid purchase price.

Where intoxicating liquors are sold contrary to law, a note made for liquors and other articles sold in a lump for a fixed price is void in the hands of the payee or of an assignee having notice of the circumstances. The illegal part of the consideration cannot be separated from the legal.

Braitch *vs.* Guelick, 37 Iowa, 212.

A contract, by which, in consideration of a gross sum, S leased the bar of his hotel to G, and sold G the right to sell liquors under a license obtained by S and agreed to board G during the lease, is totally void. The legal part of the contract cannot be separated from the illegal.

Sanderson *vs.* Goodrich, 46 Barb., 616.

Review of Trading Stamp Cases.

We find but two *habeas corpus* cases in the Federal courts, and one equity case, all depending on the validity of license laws and all entirely inapplicable on the facts, which have any bearing on the case at bar, except to show that city councils have regarded the trading-stamp business as a business which needed regulation, if not prohibition, in the interest of the common welfare and of the public morals.

Federal Cases.

Ex parte Hutchinson (137 Fed. Rep., 949). No question of "gift enterprise" arose in this case. An ordinance of the city of Seattle required a person carrying on business as a pawn broker to pay $100 per annum and exacted payment of six times as much for a license to sell trading stamps to merchants, in addition to a license fee of $100 per annum, which each merchant using trading stamps in his business

is required to pay. Held, that the ordinance was not one for the purpose of providing revenue and is void, that it deprived petitioner of his liberty in violation of the fourteenth amendment. Prisoner discharged from custody. *Ex parte* Hutchinson (137 Fed. Rep., 949).

Ex parte Hutchinson (137 Fed. Rep,, 950). On petition for a writ of *habeas corpus*. No question of "gift enterprise" arose in this case.

Petitioner failed to take out a license required by an ordinance of the city of Portland which made it unlawful for any person to sell, offer, or attempt to sell goods and merchandise by selling trading stamps to merchants for delivery to their customers without paying annually the sum of $200 for a license authorizing the same. The city charter authorized the council "to grant licenses with the object of raising revenue or of regulation, or both, for any and all lawful acts, things or purposes." Said the court: "The authority to raise revenue by a tax levied upon business is undeniable, but it does not admit of argument that the legislature cannot authorize a tax 'for any and all lawful acts, things or purposes.'" *Held, that petitioner was not engaged in a "business." The court adopted the ruling of the Supreme Court of Georgia* (Hewin *vs.* City of Atlanta, 121 Ga., 723; 49 S. E., 765) *that the purchasing of trading stamps is not a business.*

> "It is simply a mode or manner of business—an instrumentality or incident of a business."

The court also said:

> "But whether considered as a business or not, the ordinance in question and the charter which authorizes it are in violation of the rights secured by the fourteenth amendment to the Constitution of the United States" (*Ex parte* Hutchinson, 137 Fed. Rep., 950).

Humes *vs.* Little Rock (138 Fed. Rep., 929, 931). The case arose on a bill in equity filed to enjoin the enforcement of a license ordinance passed by the city of Little Rock. Considering the facts of the case, the court found as follows:

> "(1) It will be observed that no element of chance enters into the plan. There are no drawings; no opportunities to win a larger sum upon a wager of any kind. The stamps have the same purchasing power in the hands of every one, and every one has the same right of selection among the complainant's stock, and the question presented by the bill is, has the city council the power to license or suppress an enterprise of this character?" (Page 930.)

After further discussion the court said:

> "We therefore conclude that 'gift enterprises,' as used in the statute, imply an element of chance, and that, as no such element is to be found in the plaintiff's scheme, *as described in the bill,* it does not fall within the terms of the enactment, and the defendant has no power either to license or suppress it" (p. 931).

The Lansburgh case was approved and distinguished in terms. Said the court:

> "We have not overlooked the able decision of the Supreme Court of the District of Columbia in Lansburgh *vs.* Dist. of Columbia, 11 App. Cas., 512. But that case is clearly distinguishable from this. The act of Congress governing the District prescribes what is meant by 'gift enterprises,' and its definition precisely covered the trading-stamp concern. That definition is not binding here. It may be that Congress defined the kind of business that it intended to reach by the term 'gift enterprises' because it knew that the term in its ordinary acceptation would have a more restricted meaning, just as in the new bankrupt act many terms are defined in the opening section as

applying to things that would not otherwise be included."

Humes *vs.* Little Rock (138 Fed. Rep., 929, 930, 931).

Ex parte Hutchinson (137 Fed. Rep., 950).

Other Federal cases do not involve the case of "gift enterprises." They relate to rivalries within the trading-stamp business, between competitive concerns, or otherwise between faithless employees and trading-stamp companies, where the object has been to obtain a portion of the profits derived from the consumer. These litigants, in their own interests, would not and did not disclose anything tending to show that the trading-stamp business involves uncertainty, contingency, or chance in dealing with the consumer. Between such interested parties the parasite is put forward as an advertising business.

In Sperry & Hutchinson Co. *vs.* Mechanics Clothing Co. the bill sought to enjoin the defendant from buying and reissuing trading stamps to merchants. No question of "gift enterprise" was raised, and both parties assumed the business to be lawful (Sperry & Hutchinson Co. *vs.* Mechanics Clothing Co., 135 Fed. Rep., 833). A similar case is that of Sperry & Hutchinson Co. *vs.* Weber & Co., 161 Fed. Rep., 219.

Sperry & Hutchinson Co. *vs.* Temple arose on a bill for an injunction against an employee of the company to enjoin the purchase of trading stamps for resale. Neither party claimed that any question of "gift enterprise" was involved, and the facts do not fully appear. The court said: "The nature of the business requires that there should be a certain monopoly," and also "Undoubtedly, the way in which the business is done, requiring stamps to be redeemed in articles of merchandise, mainly articles of furniture, *leads to certain impressions on the part of the public which induce the public to take the trading stamps when otherwise they would not*

take them. That, however, is not distinguishable from many usual methods adopted by merchants for inducing custom, and it is one of those methods of so inducing custom which courts cannot interfere with, unless they are disposed to protect the public beyond what the law permits. *So far as this case is concerned,* the court is unable to perceive from any proofs in the record, or from any suggestion, that the business of the complainant is not perfectly legitimate, honestly carried on, and, therefore, a business which the courts ought to protect, and one which the legislature has no right to obstruct" (Sperry & Hutchinson Co. *vs.* Temple, 137 Fed. Rep., 992, 993).

State Habeas Corpus Cases.

In State *vs.* Shugart (138 Ala., 86), on appeal, it was held there was no statute defining the offense.

The petitioner had been arrested on a warrant charging him with carrying on a lottery or "gift enterprise," and was reviewed on a bill of exceptions. The bill of exceptions states that "no lot or chance was in anywise employed" * * * "It was not required that the checks be pasted in the book, as the book was provided for the convenience and safety of keeping the checks." The statute did not define "gift enterprises." The court held, that "An allotment or chance must enter into the scheme" (page 93). The court also said (page 93): "Moreover, the *bill of exceptions precisely recites that 'no lot or chance was in any wise employed nor was there any distribution of such articles.'*" The Lansburgh case was held not in point and was neither approved nor disapproved.

Ex parte McKenna (126 Cal., 429). Petitioner was arrested charged with the offense of carrying on the business of selling trading stamps without license contrary to a city ordinance and the case was reviewed on the facts. The court said (page 431): "The complaint upon which the prisoner

was arrested means nothing more than this: that in conducting the business of a merchant he makes a practice of issuing stamps or tickets which he agrees to redeem and does redeem in merchandise or money. If such a practice is not embraced within the terms of the ordinance the complaint charges no offense, and the imprisonment is, of course, unlawful." The court also said (page 431): "In support of the ordinance, it is contended that the trading stamp device is a lottery in disguise and therefore immoral. But we cannot see that it has any resemblance to a lottery. There is in it no element of chance and nothing in the nature of gaming. It appears to be simply a device to attract customers, or to induce those who have bought once to buy again, and in this aspect is as innocent as any form of advertising. And, besides, if it were a lottery in disguise—a mere device to cloak a gambling scheme—it would be unlawful and not the subject of a license. The ordinance, therefore, cannot be upheld on this ground. It is not an ordinance to prohibit an immoral practice or to regulate a hazardous or offensive business or conduct of a lawful game or public exhibition" (*Ex parte* McKenna, 126 Cal., 429, 431, 432).

Ex parte Drexel (147 Cal., 763). Petition for the writ of *habeas corpus* was heard and decided on the merits.

The legislature of the State had passed an act designated as the "Anti-trade Stamp or Coupon Act," not set out in the report. The court found that no element of chance existed but recognized the extent of the police power to regulate matters pertaining to the public welfare or public health or the public morals. The complaint did not aver as is averred in the case at bar, that the petitioner was engaged in conducting a "gift enterprise." The court said: "The act in question has a clause prohibiting the coupon when the selection of the property 'will depend upon chance or hazard in any manner whatever'; but this clause need not be here considered because *there is no averment in the complaint, nor is it claimed, that there is here any chance or hazard*

involved, unless the general nature of the business of issuing trading stamps inherently includes chance or hazard; and, as we have before stated, it does not. * * * Our conclusion is that the said act of March 7, 1905, so far as it undertakes to make the issuance of trading stamps and coupons such as were used by the petitioners herein a misdemeanor, is unconstitutional and void."

State *vs.* Zimmerman (102 App. Div. (N. Y.), 103): The statute prohibited the issuing of trading stamps unless issued by a merchant or manufacturer in his own name and redeemable by him. Petitioner was arrested for selling a bag of tobacco which contained a coupon ticket entitling the holder upon presentation to a third party of a certain number of tickets to a choice of presents enumerated in a catalogue. A writ of *habeas corpus* was issued before trial, the prisoner was discharged, and the State appealed. The case was heard on its merits.

The court found, under the facts in this case, that the question of public morals was not involved. Said the court: "*It may be that the trading-stamp business tends to demoralize trade. It may be that people in moderate or straitened circumstances are prone to purchase beyond their means by the incitement of a gift after a stated amount has been expended*" (page 109). "*But the moral question is eliminated by subdivision 5 of the act which excludes from its provisions tickets or coupons issued by a merchant or manufacturer in his own name and redeemable by him.* It cannot be so reprehensible as to be a crime to issue a coupon ticket redeemable by a third person, but be without sin to issue one redeemable by the seller of the goods." State *vs.* Zimmerman, 102 App. Div. (N. Y.), 103; State *vs.* Dycker, 72 App. Div. (N. Y.), 308.

It will be observed that none of the above cases held that a statute prohibiting "gift enterprises" is not within the police power. And this conclusion is not denied in any of the following State cases:

OTHER STATE CASES.

City Council of Montgomery *vs.* Kelly, 142 Ala., 552: The city ordinance required each merchant who issued trading stamps in connection with his business to pay a license tax.

Hewin *vs.* City of Atlanta, 121 Ga., 723:

> "Held: That *the furnishing of trading stamps by a merchant to his customers did not constitute a business separate and distinct from that of selling merchandise, but was merely an instrumentality in or an incident to that business, being in its nature incapable of such separate existence as to constitute of itself a business in either a commercial or a legal sense;* that authority in a municipal charter 'to make just and proper classification of business for taxation' and 'to classify business and arrange the various business, trades, and professions carried on in said city into such classes of subjects for taxation as may be just and proper,' did not authorize the passage of an ordinance separating from the business of selling merchandise the incident of furnishing trading stamps for the purpose of increasing the sale of merchandise and classifying the furnishing of such stamps as a separate business subject to taxation."

The court distinguished the Lansburgh case on the ground that the statute defined "gift enterprises" "in such a way as to include the use of trading stamps by merchants" (pages 734, 735).

Winston *vs.* Beeson, 135 N. C., 271, involved the question whether, under its charter, the city had the power to tax dealers in trading stamps where the charter gave authority to tax "gift enterprises."

Held: "The provision refers to gifts or prizes the precise nature of which are not known at the time, and to cases in which the element of uncertainty is always present. It is

restricted, therefore, to the kind of enterprises which appeal to the gambling instinct" (page 281).

The court also said (page 285):

> "Since this opinion was prepared we have read the case of Lansburgh & Sperry *vs.* Dist. of Columbia, 11 App. Case (D. C.), 512, which has been called to our attention. We do not think anything said in that case, which was necessary to its decision, conflicts with what we have herein decided. The only point in that case was whether the business of the defendants came within the meaning of a 'gift enterprise' as defined by the statute of the District" (Winston *vs.* Beeson, 135 N. C., 271).

State *vs.* Dodge, 76 Vt., 197, is based on a statute which prohibited the merchant making the sale from delivering in connection therewith any stamp, coupon or other device which entitled the purchaser to receive from any third person any other property than that actually sold or exchanged, and it also prohibited the third person from delivering goods, wares, or merchandise upon the presentation of such stamp, coupon, or other device. This statute is addressed to private business, and not to a business of conducting a gift enterprise which contains an element of chance. The court said:

> "If the purpose of this act was to prohibit transactions having an element of chance, there was no occasion for its enactment, for transactions having such an element were already prohibited by V. S. 5125, 5126, 5127. If the giving and redeeming of stamps, coupons, or other devices is so conducted as to be in fact a lottery, or chance scheme, the offense is punishable under this statute; but, as we have seen, *the complaint does not show that the respondent conducted a business having elements of chance, and, therefore, does not charge an offense under this statute.*"
>
> State *vs.* Dodge, 76 Vt., 197.

In State *vs.* Ramseyer (73 N. H., 31, 37) the court said:

> "The statute under consideration in State *vs.* Dodge is identical with the statute in question in the case at bar. This coincidence renders it quite probable that the New Hampshire statute passed in 1899 was copied from the Vermont statute passed in 1898. In the act referred to the court say: 'It is not attempted by the act to regulate the giving of stamps or coupons redeemable in goods, wares or merchandise by a person other than the giver of the stamp or coupon.'"

The court also said:

> "The case of Lansburgh *vs.* Dist. of Columbia, 11 App. Div. (D. C.), 512, is not in point. The decision seems to be based upon facts tending to show a lottery in the manner the stamp business was there conducted, which does not exist in this case, and cannot be judicially found to exist as a matter of speculation or inference. The case of Hume *vs.* Ft. Smith (93 Fed. Rep., 857), which adopts the reasoning in Lansburgh *vs.* Dist. of Columbia, relates to a regulation, not the prohibition of the stamp business."
>
> State *vs.* Ramseyer, 73 N. H., 31, 37.

In State *vs.* Dalton (22 R. I., 77) it was said:

> "If the act had prohibited the giving away of any stamp or device in connection with the sale of an article which would entitle the holder to receive, either directly from the vendor or indirectly through another person, some indefinite and undescribed article, the nature and value of which were unknown to the purchaser, there would then be introduced into the prohibited transaction enough of the element of uncertainty and chance to condemn it as being in the nature of a lottery. * * * In order that we may not be misunderstood in the position which we feel compelled to take regarding the case before us, we deem it proper to say that we do not approve of the trading-stamp business as some of the cases re-

> ferred to inform us it is conducted, although there is no evidence before us concerning it, nor do we decide that it is not competent for the General Assembly to prohibit it."
>
> State *vs.* Dalton, 22 R. I., 77-91.

The latest State case was decided April 15, 1910, by the Supreme Court of Minnesota (State *vs.* Sperry & Hitchinson Co., 126 N. W. Rep., 120). The case states that the Statute of Minnesota, ch. 142, laws, 1909 (Rev. Laws, Supp. 1909, sections 5170-5 to 5170-8), declares that any contract or arrangement between two parties by which one of them shall issue and redeem trading stamps, or tickets, which are given in connection with the sale of merchandise by the other, shall constitute a gift enterprise, unless the articles promised to be given as such gift or premium shall be definitely described on the stamp or ticket, and the character and value of the articles are made known to the purchaser of the merchandise at the time of the purchase, and unless the right of the holder of such stamp, or ticket, to the gift or article so promised for its redemption, becomes absolute upon the completion of the delivery thereof, without the holder being required to collect any specific number of stamps or tickets and present them collectively for redemption, and unless the right of the holder of such stamp or ticket to the prize or gift so offered is absolute, and does not depend on any chance, uncertainty, or contingency whatever. Held, the act is a constitutional exercise of the police power, in so far as it prohibits the issuing of trading stamps or tickets to be redeemed in articles of merchandise in any manner which depends upon any chance, uncertainty, or contingency.

2. The issuing and redemption of trading stamps, as carried on by respondent company, is not attended with such elements of chance, uncertainty, and contingency as to justify the restriction imposed by the act. The enforcement of

these conditions against the company would operate, not as a reasonable regulation of its business, but practically as an absolute prohibition thereof.

Quo warranto directing respondent to show cause by what warrant it claimed the right to continue the enjoyment of its corporate franchises and privileges in the State of Minnesota. The case was decided on the petition.

The court found that the trading-stamp business was a *business affecting the public interest.* Said the court:

> "We recognize the fact that legislative regulation is not necessarily dependent upon whether the business, as conducted by respondent, affects the public health or is attended with the features of a lottery. It has long been settled that any business although legitimate in itself is subject to regulation by the police power whenever so conducted that it may fairly be said that it affects the public interest or welfare. The public interest may be affected when a business is conducted on such a scale and under such conditions as to lead to an abuse of the confidence of those who have occasion to transact business in that line. The rates of interest of insurance business, the regulation of corn elevators and warehouses, hawking and peddling, bakeries, butcher shops, etc., have been recognized as proper subjects for police regulation, not because of anything naturally wrong in these vocations, but because of the character of the business, opportunities are present for deception on account of the difficulty the customer has to obtain knowledge of the character of the contract or the merchandise. So with reference to certain lines connected with the handling of agricultural products. Where the producer is located at a distance from the commission house the law may properly regulate the conditions upon which commission and brokerage houses shall do business with the public."

The court then cites the case of Knoxville Iron Co. *vs.* Harbison (183 U. S., 13), and said:

"In the latter case an act of the legislature of Tennessee was upheld which required the redemption in cash of store orders or other evidence of indebtedness issued to employés in payment of wages. *If, in dealing with the merchant and his customers there is an opportunity to take advantage of them by a persistent system of attractive advertising and other inducements, then reasonable safeguards and limitations may be provided to prevent such abuses.* But the difficulty of the present law is that it is not designed to regulate a legitimate business. It condemns the business conducted by the respondents as illegitimate because the public is induced to engage in lottery transactions and placed such restrictions about the issue and redemption of stamps as to make that business impossible. In State *vs.* Hawkins, *supra,* the Maryland statute was held valid in so far as it was directed to prevent the holder of stamps from receiving in exchange therefor anything uncertain, undetermined or unknown to the purchaser of the goods at the time of the purchase." * * * "Our conclusion is that, in so far as chapter 142, Laws of 1909, prohibits companies or parties from issuing or redeeming trading stamps under contracts which in practice depend on chance, uncertainty or contingency, the law is a proper exercise of the police power; that the business of issuing and redeeming trading stamps as conducted by respondents is not attended with such elements of chance, uncertainty and contingency as to come within that provision of the act; that the provisions requiring each stamp to be valued and redeemed independently of other stamps, and to have printed thereon its character, value of the article offered for redemption, constitute unnecessary restriction amounting to practical prohibition of the business as conducted by the respondents, and are not a proper exercise of the police power of regulation."

"JAGGARD, J.: I respectfully dissent. The presumption in favor of the constitutionality of legislative action is strong. A statute should not be voided

unless clearly necessary. The authorities do not impress me as compelling the decision that the law here in issue is unconstitutional, although not all of them can be substantially distinguished as to show that they do not hold it invalid. Moreover, I am unable to perceive why the statute should not be upheld because it excludes an illegitimate business. *In effect, it regards the defendant as a commercial parasite and prohibits its existence. The facts justify that definition and prohibition.*"

State *vs.* Sperry & Hutchinson Co. (126 N. W. Rep., 120-126).

In Commonwealth *vs.* Sisson (178 Mass., 581) the court limited the act to the construction of an earlier act as construed in Commonwealth *vs.* Emmerson (165 Mass., 146), and the court held that cases outside of Massachusetts could not be considered. The statute, as construed by the court, merely prohibits the use of trading stamps in transactions involving the element of chance, and as thus construed, held the law to be constitutional, as it appeared that there was no gambling element in the defendant's transaction, and his acts were not prohibited by law.

Commonwealth *vs.* Sisson (178 Mass., 578).
Commonwealth *vs.* Emmerson (165 Mass., 146).

"If these stamps were used in such a way as to constitute a lottery game of chance, the use would be punishable."

O'Keeffe *vs.* Somerville (190 Mass., 110-114).

Young's case (101 Va., 853) relies almost entirely upon State *vs.* Dalton (22 R. I., 77), which, as above shown, is not in point, and is a distinct approval of the Lansburgh decision.

In the following cases the coupon was redeemable by the merchant who made the sale:

Commonwealth *vs.* Gibson Co. (125 Ky., 440).
Long *vs.* State (74 Md., 565).
People *vs.* Gibson (109 N. Y., 389).

It was held in Denver *vs.* Frueauff (39 Colo., 20) that an ordinance forbidding any "gift enterprise" and defining a "gift enterprise" to include the gift of any trading stamp or other device which entitled the purchaser of goods or other property to receive from any person or corporation other than the vendor any property other than that actually sold, is invalid, for the reason that it is not a proper exercise of the police power.

Denver *vs.* Frueauff (39 Colo., 20).

The above cases go no further than to hold that the element of uncertainty, contingency or chance may be prohibited by the exercise of the police power and to determine, under the particular facts under review in each case, whether such an offense has been committed or whether the ordinance or statute is within the police power as thus defined.

The Lansburgh case was approved and followed in Humes *vs.* Ft. Smith (93 Fed. Rep., 857, 862, 864); State *vs.* Hawkins (95 Md., 146); Fleetwood *vs.* Read (21 Wash., 547).

These cases and others are classified under six heads by the Court of Appeals in District of Columbia *vs.* Kraft (38 W. L. R., 406) (petition, pages 45 to 47). The court said (petition, page 48):

> *"In the case at bar the advertising feature is a mere pretense;* it is of the stamp dealer rather than the merchant. To induce the purchase of stamps the stamp company circulates many copies of its books which contain the directory of the names and the locations of the merchants under contract with it to deliver its stamps with purchasers. It is a notice to these persons where they can procure stamps and where and how they can procure the redemption of the same when obtained. This is of prime importance to the stamp company. The trading-stamp concerns are not engaged in the advertising business or as agents for advertisers."

The court then reviews the Lansburgh case, and after citation of authorities, proceeds:

> "Several other concerns being engaged in the same business their profits are probably as great, if not greater. We have then this large sum of money annually taken from the merchant and his customers and added to the gross cost of living of all of the people of the District without return. Is it not for the public welfare in the juridical sense of the term to prohibit such an undertaking? We think it is. Must this public welfare be sacrificed to the unlimited freedom of contract invoked in this case to protect the right to prey upon local commerce? We think not."
>
> District of Columbia *vs.* Kraft, 38 W. L. R., 406, 409, 410 (petition, page 40 *et seq.*).

The Lansburgh case was an application of the police power to a "gift enterprise" conducted by a trading-stamp concern, and it was held that

> "The prohibition of such a scheme is clearly within the power of Congress within this District, and the statute under which the prosecution has been maintained makes ample provision for its exercise."
>
> Lansburgh *vs.* Dist. of Columbia, 11 App. D. C., 512, 532.

> "In Phalen *vs.* Virginia, 8 How., 163, 168, after observing that the suppression of nuisances injurious to public health or morality is among the most important duties of government, this court said: 'Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.' In other cases we have adjudged that authority given by legislative enactment to carry on a lottery, although based upon a consideration in money, was not protected by the contract clause of the

> Constitution; this, for the reason that no State may bargain away its power to protect the public morals, nor excuse its failure to perform a public duty by saying that it had agreed, by legislative enactment, not to do so. Stone *vs.* Mississippi, 101 U. S., 814; Douglas *vs.* Kentucky, 168 U. S., 488."
>
> Lottery case, 188 U. S., 321, 356.

The case of McLean *vs.* Arkansas, 211 U. S., 539, in some of its aspects, presents a very close parallel to the case at bar.

In that case the court upheld a statute of Arkansas requiring coal to be measured before screening, for the payment of miners' wages, as within the exercise of the police power of the State.

On page 545 the court said:

> "But in many cases in this court the right of freedom to contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the State, enacted for the protection of the public health, safety, or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract."

On page 547 the court reiterates the view that the policy of the particular piece of legislation is a matter for the legislature, and that the courts will not interfere "Unless the act in question is unmistakably and palpably in excess of legislative power." See also page 548.

In that case the legislature had declared the question of policy and the court of last resort of Arkansas had sustained that legislation. In the case at bar Congress has declared the policy which shall obtain in the District of Columbia, and the Court of Appeals for the District has twice sustained that legislation. Lansburgh *vs.* District of Columbia, 11 App. D. C., 512; District of Columbia *vs.* Kraft, see petition in this case, page 40. In the McLean case the court showed

that similar legislation had been enacted in other States. The same is true of the legislation here. The court also showed in the McLean case, page 549, that the legislation in other States had been declared to be void. The same is true of legislation similar to that involved here. Then the court proceed to say in the McLean case, page 549:

> "We are not disposed to discuss these State cases. It is enough for our present purpose to say that the legislative bodies of the States referred to, in the exercise of the right of judgment conferred upon them, have deemed such laws to be necessary."
>
> "So, also, as the statute makes a classification based upon a reasonable distinction, and one which, as we have seen, has been generally applied in the exertion of the police power over the subject, there is no foundation for the proposition that the result of the enforcement of the statute will be to deny the equal protection of the laws." Page 496.
>
> Lemieux *vs.* Young, 211 U. S., 489.

And in Halter *vs.* Nebraska, 205 U. S., 34, sustaining a statute of Nebraska forbidding the use of the United States flag for advertising purposes, the court said (pages 39, 40):

> "The importance of the question of constitutional law thus raised will be recognized when it is remembered that more than half of the States of the Union have enacted statutes substantially similar in their general scope to the Nebraska statute. That fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the States have, in their legislation, violated the Constitution of the United States."

And again, at page 45:

> "It would be going very far to say that the statute in question has no reasonable connection with the common good and was not promotive of the peace, order, and well being of the people. Before this court can hold the statute void it must say that, and,

in addition, adjudge that it violates rights secured by the Constitution of the United States. We cannot so say and cannot so adjudge."

Congress, in the exercise of the police power, has passed laws to regulate and license pawnbrokers (act of March 2, 1889, — Stats. —), junk dealers, dealers in second-hand personal property (act of March 3, 1891, — Stats. —), requiring that provisions or produce or commodities of any kind must be sold by the true weight or measure, weighed by scales, weights, or balances, or measured in measures duly tested (act of June 20, 1906, — Stats. —), regulating the keeping of employment agencies (act of June 19, 1906, — Stats. —), licensing of billiard and pool tables (act of February 25, 1897, 29 Stats., 594), regulating the sale of coal so as to insure full weight to purchasers of coal (act of June 14, 1878, 20 Stats., 131).

The assize of bread was among the first British written laws (Hist. of the English Law, by Pollock and Maitland, vol. 1, pp. 136 to 138, inc.; and see Growth of English Industry and Commerce by Cunningham, pp. 567 to 569 inc.). From 1806 until the repeal thereof by the effect of the act of February 21, 1871 (16 Stats., 419), constituting the entire District a municipal corporation, ordinances regulating the size of loaves of bread and their weight were in force in the cities of Washington and Georgetown.

Under section 7 of the act of Congress approved July 1, 1902, mediums, clairvoyants, soothsayers, fortune tellers or palmists, by whatsoever name called, cannot obtain a license without the approval of the Major and Superintendent of Police, and bill-posters may not maintain advertisements on houses, buildings, bill-boards, fences, or other structures without the written authority of the Commissioners of the District of Columbia. Many other instances of legislation and municipal regulation might be cited.

In Munn *vs.*, Ill., 94 U. S., 113, 129, 152, it was held that

there was no doubt of the competency of the State to prescribe the weight of a loaf of bread, as it may declare what weight may constitute a pound or a ton, and in McLean *vs.* Arkansas, 211 U. S., 539, 550, this court said:

> "Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts, although in compelling certain modes of dealing they interfere with the freedom of contract. Many cases are collected in Mr. Freund's book on 'Police Power,' sec. 274, wherein that author refers to laws which have been sustained, regulating the size of loaves of bread when sold in the market; requiring the sale of coal in quantities of 500 pounds or more by weight; that milk shall be sold in wine measure, and kindred enactments."
>
> McLean *vs.* Ark., 211 U. S., 539, 550.

We therefore respectfully submit that the application for the writ of *habeas corpus* should be denied.

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